

Designing, From the Ground Up, A Self-Help Centered Court, One In Which The Litigant Without a Lawyer Is the Norm

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Dedication

This work is dedicated to the hardworking, underpaid, and unappreciated lawyers and advocates who struggle in the face of inadequate resources to provide legal counsel and access to justice to the poor and excluded. It is your vision of access to justice that stands behind the inquiry of this work. If there were more of you, and if your work was better supported, this document would be largely unnecessary.

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Part One: Vision, Barriers and Approaches

I. Introduction¹

The Challenge and the Vision

In November 1999, in his welcome to the American Judicature Conference on the Challenges of Pro Se² Litigation, Chief Judge Thomas Zlaket of the Arizona Supreme Court challenged judges, court administrators and the bar to realize that we are rapidly coming upon a future in which the idea of a lawyer present with client will be a myth in many civil courts. He demanded that we start to plan for this reality. That this reality is coming to pass, no matter how much we might desire otherwise, is unavoidable because the cost of lawyers is escalating beyond the reach of most middle income people, and

¹ It is, of course, impossible to acknowledge fully the ideas and help of the broad range of people in the justice system innovation community that made this paper possible. It would be true injustice, however, to fail to name some people specifically, particularly John M. Greacen, Director of the Administrative Office of the Courts of the State of New Mexico, Bonnie Hough, Esq., of the California Administrative Office of the Courts, Michael Hertz, Esq., founder of Probono.net, and Deborah Howard, Project Director of the Law School Consortium Project. Similar thanks to David Rottman and Paula Hannaford of the National Center for State Courts for research support.

This project would have been nothing without the support, encouragement, and understanding of the State Justice Institute, and particularly of its President, David Tevelin, and of the Program Officer for this project, Pamela Bullock. Nor can this section close without explicit mention of Catherine Samuels, Director of the Law and Society Program of the Open Society Institute, and John McKay, President of the Legal Services Corporation, two organizations which, while they have not directly funded this project (and, of course, can in no way be held responsible for its content), have through their commitment to the general agenda of access to justice makes it all seem a little less impossible.

Last, but not least, thanks to all my now quite extended family, especially my wife Joan, my twenty-five year partner in hopefully optimistic dissatisfaction with the world as it is now, and our children and grandchildren, who remind us why we do what we do.

² There has been considerable debate about the most appropriate way to describe those who choose or are forced to proceed without a lawyer. Many reject the traditional terms *pro se* or *pro per* as being needlessly legalistic. Some use “un-represented” as sufficiently descriptive. Chief Judge Kay of New York recommends “self-represented,” presumably to emphasize, correctly, that those who have no lawyers should be treated with the same dignity and respect as those with lawyers. Others criticize that formulation as inadequately drawing attention to the huge additional burden borne by those who do represent themselves. The author of this paper prefers “Self Help” as the generic term to describe the concept, while agreeing with those who believe that more focused phrases, such as “litigants without lawyers” may be most appropriate in particular situations. In their seminal work, *Meeting the Challenge of Pro Se Litigation: A Guidebook for Judges and Court Managers*, (American Judicature Society, 1998), (hereafter, *Meeting the Challenge*), Goldschmidt, Mahoney, Solomon and Green, use the phrases “self represented litigant and “pro se litigant,” “interchangeably.” The perfect term or combination of terms remains to be suggested.

because any possibility of adequate funding for lawyers for the poor is becoming dimmer and dimmer.

This work is a first effort to shape a comprehensive and integrated response to that challenge.³ It offers preliminary thoughts on a fundamental redesign of courts, including every aspect of the entire institution, from building design to judicial training, from technology to clerk role.⁴ Together the paper's suggestions offer a comprehensive vision, a vision of how a courthouse, courtroom, court team, and court processes could be planned together from the ground up to provide to provide simple, open and affordable justice to all.⁵

The suggestions reflect a core belief that most of the problems that occur in self help court innovation come from the fear of "bending over backwards" to help one side or another. The author believes that such problems occur only when the system itself is unhelpful. In such circumstances interventions to provide help seem like an aberration, and therefore unfair to one side. The trick, however, is to build every component of the court so that the whole process is helpful and open to all litigants. Then the help seems neither unfair or arbitrary, rather it is just the way things should and do work.

The Sobering Reality of Courts Today

The unfortunate reality is now undisputed and well documented. While our entire intellectual, jurisprudential and even physical model of courts is build around the assumption that every litigant has a lawyer literally standing beside him or her, the reality is that in many courts, many or almost of the cases do not fit that model. Rather one, or frequently both parties, stands alone.⁶

³ The increasing recognition of the importance of this challenge is illustrated by the recent approval by the membership of the Conference of Chief Court Administrators (COSCA) of its *Position Paper on Self Represented Litigation* (2000).

⁴ The work does, however, does not, except at the margins, explore the full implications of emerging challenges to the fundamental assumption of an adversary system in which truth and fairness are assumed to emerge from clear statements of conflicting positions, subject to confrontation. As a general matter the work assumes that at least some components of an adversarial system should remain. It leaves to others the exploration of the possible elimination of that component.

⁵ The idea is not new. Roscoe Pound, wring in 1913 wrote: "For ordinary causes, our contentious system has great merit as a means of getting the truth, but it is a denial of justice in small causes to drive a litigant to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity *what the state should give as a right*." Roscoe Pound, *The Administration of Justice in the Modern City* 26 Harv.L.Rev. 302, 318 (1913)(emphasis added).

⁶ A number of state studies, including those covering Arizona, California, Connecticut, and the District of California confirm this conclusion, *Meeting the Challenge*, *supra*, note 2, at pages 8-9. A National Center for State Courts study of 16 major urban areas similarly confirms it, Goerdt, *Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation*, 16 Urban Jurisdictions 48 (National Center of State Courts, 1992). In California, a recent court study found

The impact is similarly undisputed. Court calendars are clogged, clerks are overwhelmed and resentful, and litigants feel deprived of access to justice.⁷ Most significantly, when the assumptions on which the system is built are out of kilter with reality, nothing works properly for anyone. Fully “lawyered” cases are disrupted whenever the court calendar is delayed, and often unprepared and less-than-helpful clerks have to keep everyone waiting as they tangle with resentful and uninformed litigants.

This Reality Reflects the History of How Courts Were “Built”

What has happened is that as we have attempted innovation, without really thinking about it, we have added mismatch to mismatch, continuing the assumption of full lawyer availability, even when the reality was very different. Our systems of court house design, judicial selection and training, court staff selection, training and promotion, technology innovation, procedural rulemaking, and even substantive law, all continue, with few exceptions to assume the traditional full lawyering model. Almost every judge chosen, every clerk hired, and every courthouse rebuilt in the last 25 years has been done, in a certain sense, under false pretenses.

This is particularly the case since many of these decisions are made by those in little touch with the day to day of courthouse interactions. Legislators and county governments, often responsible for funding, staffing and physical space, can hardly be blamed for failing to realize that it is not like it appears on TV (Judge Judy notwithstanding);⁸ Judicial selection panels, focused on the higher end of the law, can hardly be blamed for failing to recruit judicial candidates best fitted to the reality of litigants without lawyers.

that in child support cases, only 15.95% of the cases had counsel on both sides, and that in 63% of cases *neither* party was represented (let alone the children). Judicial Council of California, *Review of Statewide Uniform Child Support Guidelines* at p. 6-21 (1998)

The vast majority of litigants who choose to proceed without lawyers apparently do so because of the cost. A 1995 survey in by the Unified Family Court effort in King County (Seattle), WA, found that 72% were without lawyers because of cost, and only 7% because of a mistrust of attorneys or because they were unhappy with previous legal assistance. Unified Family Court of King County, Washington, *Pro Se Resource Center -- Task Force Report* (1995). See also, Francis L. Harrison, Deborah J. Chase and L. Thomas Surh, *California's Family Law Facilitator Program: A New Paradigm for the Courts*, 2 *Journal of the Center for Children and the Courts*, 61, 89 (2000), <http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol2.htm> (table showing income levels of clients of the California Family Law Facilitator Program).

⁷ *Meeting the Challenge*, above note 2, at p.15

⁸ It is true and suggestive that legislators do receive requests for help from litigants who do not have lawyers. For this reason, legislatures may be becoming more sympathetic to funding innovations that will meet this need and remove pressure on legislators for individual interventions.

Initial Innovations and Experiments Have Been Fragmentary. If Highly Suggestive of Possible Solutions

Faced with, and recognizing the fact that, most civil litigation now occurs without lawyers, a number of initial innovation experiments have been started. These include the creation of self help centers⁹ and courthouse facilitators,¹⁰ the establishment by courts and legal services programs, and the private sector growth of informational web sites,¹¹ and the launching of various forms of unbundled *pro bono* (and sometimes paid) legal assistance in which the litigant and the lawyer agree that the attorney will perform only certain tasks, while the client will handle others on their own.¹²

While these valuable innovations have had a very significant impact both on individual litigants and on our understanding of the potential of reform, they have all been incremental. Each innovation attempts to help by adding a fix to one part of the problem, mainly by providing help to the litigant before he or she gets to court. Notwithstanding the undoubted and well earned enthusiasm of users for these services,¹³

⁹ One of the best known is the Maricopa County Self Help Center in Phoenix Arizona, described in *Meeting the Challenge*, above note 2, at page. 73. An additional wide variety of programs is described in *Meeting the Challenge*, above, note 2, at page 81-101 and in Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham Law Rev, 1987, 1999 (1999).

¹⁰ The California program is by far the most extensive. By statute, there is a Family Law Facilitator in every county. California Family Code §10002 (“Each superior court shall maintain an office of the family law facilitator”). See also §10004 (mandatory duties of facilitator); §10005 (optional duties which may be added by court rule); §15010 (pilot family court information centers). See also, *California’s Family Law Facilitator Program: A New Paradigm for the Courts*, above, note 6, at page 61.

¹¹ The best of these sites are collected and referenced on the National Center for State Courts Website at <http://www.ncsc.dni.us/ctc6/spot/top.html>. See, also, the Utah Court Preparation System online and accessible at <http://192.120.193.15:4080/html/ListOfApplications.html>. A much more comprehensive list of technology innovation in legal services delivery is: William Hornesby, *Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm*, <http://www.zorza.net/resources/hornsby.html> (1999)

¹² See, generally, Forest Mosten, *Unbundle Your Law Practice: How To Deliver Legal Services a la Carte For Improved Service And Profits*, (ABA Section on Law Practice Management; 2000). The introduction and the chapter on ethics from this book can be found on the web at <http://www.zorza.net/resources/Ethics/most-TOC.html>. In a number of states, the bar has been more supportive of this approach than of broader governmental support to those who do not have counsel. In such states court self-help staff have cooperated by referring clients (sometimes with court papers already completed with the assistance of court staff) to attorneys who provide this unbundled service.

¹³ See, e.g., *Analysis of Self-Service Center Exit Survey Questionnaires*, (1977), cited in *Meeting the Challenge*, above note 2, at pages 74-75. Probably the most comprehensive evaluative work on services for the non-represented is being conducted in the context of legal services “hotlines,” phone services that give advice as well as information, but do not provide representation, Jessica

few of the programs have as yet, except indirectly, redesigned any of the court processes themselves – filing, courtroom process, decisions, enforcement – to make them more user friendly.¹⁴

It can not be forgotten, however, that in the day to day work of dealing with self-help litigants, court staff around the country, including judges and clerks, have evolved many unsung and unheralded innovations. As a practical matter, many of them have long worked in courts in which the lawyer is the exception. As we move forward, we can have confidence that we know more than we realize we know about self-help. We must listen for and nurture the innovations of those who do this work.

Implications for the System as a Whole – Is Self Help Really Different?

As this analysis proceeds, moreover, we may well find out that many of the innovations or ideas that are offered are just as appropriate for those cases and courts that do assume the presence of an attorney. Many of our processes and assumptions are out of date for reasons that go way beyond the unrealistically assumed presence of a high paid advocate.

II. The Ongoing Barriers to Effectiveness for Those Who Represent Themselves

Information is Not Enough: Looking at Barriers to Access and the Problems in Innovation

Given the range of self-help experiments, those responsible are a highly valuable source of information on the as-yet unsolved barriers to access.¹⁵ It is the people who have attempted to solve the problems of litigants without lawyers who best know both

Pearson and Lanae Davis. *The Hotlines Assessment Study: Final Report – Phase II* (Center for Policy Research, 2000).

¹⁴ In practice, many of the innovations have undoubtedly significantly altered the culture of the courts in which they have been placed, making assistance to those without lawyers first institutionally acceptable and the standard. Particularly when the self-help staff enjoy judicial support, the availability of self-help staff allows the judges to rethink their roles, and collaborate closely both in solving individual case problems and in improving the court processes. In states such as California which have a statewide network of self-help facilitators, that network can act as a powerful force for change, at the state and local level, both recommending rule changes, and providing quiet support for those who need to intervene in particular situations. See generally, *California's Family Law Facilitator Program: A New Paradigm for the Courts*, above, note 6.

¹⁵ Particular thanks must be made to the California Family Law Facilitators, who supported this work by engaging in a detailed analysis of the barriers to effective assistance, to the participants in the August 2000 National Association of Court Managers Workshop on this topic, to the faculty and participants in the May and October 2000 workshops on Pro Se Collaborations, held in collaboration by a number of organizations, including those listed above in note 1, on page 1, and the American Judicature Society and the Judicial Management Institute. John Greacen, and Bonnie Hough have been particular contributors to this analysis.

exactly what those problems are, and why existing piecemeal innovations have not more fully solved the problem.

Among the most significant ongoing barriers reported by litigants and innovators and:¹⁶

The Analysis Barrier. Most self-help assistance programs report as the key problem that telling people the law was not enough. Litigants often need far more help than the program could give them in analyzing the implications of the law, in taking that law, applying it to facts, and then forging out of the law and the facts a coherent and persuasive legal argument. For example, it is one thing to tell a litigant that service or a court paper must follow certain rules. It is quite another for the litigant to be able to understand the legal meaning of what actually happened in a failed attempt at service.

The Situation and Options Evaluation Barrier. Self help litigants have difficulty in getting the perspective to decide when to settle, rather than pursue litigation, and when to choose alternative dispute resolution, rather than insist on resolution through the court. Such evaluation typically requires a broader range of information in context than it is reasonable to expect a litigant to have. Such evaluation also may require the freedom to talk in confidence about all aspects of the situation, including those that the litigant considers it would be embarrassing or dangerous to reveal publicly or to the other party.¹⁷

The Preparation and Presentation Barrier. Most self-help litigants are not good at presenting a claim (even if they do understand it). It should take not a great feat of memory for the typical lawyer to remember how hard was that first attempt to explain something to a judge in a crowded courtroom. Often emotions – healthy emotions – get in the way of appearing “logical” and litigants are penalized by fact finders who find at best find it hard to isolate the relevant facts, and at worst wrongly suspect those who are

¹⁶ Bonnie Hough, informally describes this approach as “asking what it is that lawyers actually do for people.” See, generally, Deborah Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: an Empirical Analysis*, 86 Yale Law Jour. 104, 141-145 (1976) (analyzing actual activities in uncontested cases).

¹⁷ It is here (as well as in other places) that the issue of whether there should be confidentiality of communications between self-help staff and litigants emerges. While those who believe that the majority of court preparation communications do not need to be confidential have a point, and while it may be true that politically and practically it is necessary for the current generation of court self-help staff to be clearly defined as not in an attorney-client relationship with those they help, nonetheless, there are important values that are served by the availability of confidential consultations. Any complete solution to the problems of litigants without lawyers should include such a confidential component, perhaps through unbundled preparatory consultation. See, below, note 99. Without confidential counsel, litigants find it hard to know what will get them in trouble, what the risks of various paths are, and how best to handle awkward, embarrassing, difficult, (or worse) situations. Our system has made a commitment that, in the end, allowing for such help results in fairer outcomes that are more broadly acceptable to society.

emotional of being unreliable.¹⁸ As a general matter, complicated multi-step claims and defenses create particularly proceedings that are particularly difficult for people without lawyers.

The Remedy Barrier. Most self-help litigants have a lot of difficulty identifying the right and most appropriate relief. It is hard for a domestic violence victim to know what will really make a difference – except in the most general terms – and even harder to figure out what relief is typically considered within the power of the court.

The Enforcement Barrier. Most self-help litigants have the greatest difficulty actually enforcing relief, even when it is ordered. The paperwork, the use of sheriffs and the wide variety of supplemental and enforcement proceedings is hard to understand, let alone navigate.

The Ethics and Neutrality Barriers. Practitioners widely report that perceived or actual limitations deriving from rules prohibiting unauthorized practice of law, governing how “unbundled” legal services are provided, and mandating judicial neutrality, represent a major barrier to innovation generally and to the concrete help litigants need day to day. While commentators tend to regard such rules as providing a far greater practical disincentive to either individual help or general innovation than needs to be the case¹⁹, that analysis is not yet well known by those who deal day to day with people without lawyers, and much analysis and advocacy remains to be done.²⁰

Bar Uncertainty. Many lawyers, and particularly the organized bar, remain profoundly nervous about self-help programs of any kind. They are likely to be particularly nervous about building a court that appears to make them superfluous,²¹ and need assistance in

¹⁸ A court that fails to find a way to correct this inaccurate tilt in its credibility findings may be guilty of unconscious yet systemic gender bias. Given the high percentage of unrepresented litigants, in family and housing courts, see note 6, above, there is every reason to believe that in many courts women form of the bulk of the unrepresented litigants.

¹⁹ John M. Greacen, *No Legal Advice From Court Personnel, What Does That Mean*, Judges Journal, Winter 1995 at 10 – 15; Richard Zorza, *Re-conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 Fordham Law Rev. 2659 (1999).

²⁰ There is, for example, astonishingly little academic or judicial writing on the real day to day constraints imposed by judicial norms upon judicial conduct in the pro se or self help context, yet repeated informal complaint about the difficulty of handling such situations. The author suspects – and his suspicions are shared by those with whom he has consulted – that these complaints derive more from fear of the unknown than a failure, after analytic effort, to craft a safe and appropriate path. See, generally, *Meeting the Challenge*, above, at 52 – 60; Russell Engler, above, note 9, at 2028-2031 (urging greater role for judges)

²¹ Deborah L. Rhode, *Professionalism in Practice: Alternative Approaches to Nonlawyer Practice*, 22 NYU Rev. of Law and Social Change, 700, 705 (1996) (“Where bar organizations have actively participated in the reform process, they have almost always resisted the kind of liberalization that expert task forces and commissions have recommended. Over the last half-

understanding that such a court would help them in their practice, both by making court a simpler place, and by helping them find clients.

To summarize, practitioners report that whatever resources are put into information, in the end many litigants can not be made ready to handle the courtroom by information alone. Regardless of all the information they have been given, these litigants' lack of realistic and effective preparation clogs up the court and renders the enforcement process dysfunctional. The challenge then becomes to change the overall process to design an integrated environment in which a combination of help and information *is* enough – in other words, that the expectations upon litigants without lawyers be reasonable, rather than unreasonable.²²

III. The Overall Approach to Creating Self Help Friendly Environments.

The Overall Approach Must be to Think in an Integrated Manner About the Entire Dispute Resolution Process, and Yet to be Specific About the Differing Needs of Varying Litigants and Disparate Contexts

Thinking About the Process as One Overall System. It is critical to think overall about the dispute resolution experience as a system with a set of inputs and outputs. One must always keep in mind the possibility that changes and improvements in one phase could solve the difficulties in another. For example, an on-line interactive pleading generator –

century, state bars repeatedly have fought publication of self-help law books; opposed introduction of standardized forms; prevented court clerks from providing routine legal assistance; shut down form preparation services; and blocked licensing systems for nonlawyer practitioners. [footnotes omitted.]”); *Meeting the Challenge*, above, note 6, at page 50 (noting that “one of the somewhat surprising findings from the [American Judicature Society/Justice Management Institute] survey [of courts] is that the organized bar seems to have been rarely involved in the development of court policies to guide the provision of assistance to the self-represented. . . it is clear that some of the most promising programs in the area are ones that have been developed collaboratively by bar groups, court staff and judges.”) Debra Baker, *Is This Woman a Threat to Lawyers*, American Bar Association Journal, 54 (June 1999) (describing spate of cases attempting to invigorate the enforcement of the prohibitions on the unauthorized practice of law); Contrast, *Perkins v. CTX Mortgage Company*, ___ Wash. ___, ___ (1999) (whether a particular nonlawyer activity is unauthorized practice of law depends, in part, on a balancing test comparing the public’s need for regulated professional skill with the public interest in access to the service being provided.)

²² As John Greacen has pointed out, the lack of preparation of litigants – no matter how much information they have been given – results in pressure on the court system to provide more and more practical preparation help. Such help is expensive, and, when provided by the courts themselves, can raise ethical concerns that are often, although needlessly, paralyzing.

The assumption of this paper is that any cost savings obtained by deciding not to provide such assistance are illusory. Every case that is adjourned because of a missing document or lack of preparation costs the system a great deal in wasted staff time. The litigants and society in general bear other costs such as from lost work and other disruptions. A full economic analysis of these impacts would be a useful contribution to the debate.

used by both sides – could change the way litigants understand the relationship between parts and phases of a case, and between fact and law. Such an understanding could make the courtroom processes much simpler.

Thinking in Terms of the Flow of the Case. At all times court and process designers must think of the flow of the case. They must analyze each step of the process in terms of what each litigant knows, needs, gets, and provides, and the relationship between each stage. For example, they need to think how one step can be designed so that it helps prepare litigants for the next and correct omissions in previous steps.

Think of the Everyone as a Member of a Conflict Resolution Team Working Together in a Conflict Resolution Environment. Similarly, process designers must think of the possibility that the needs of litigants and the process can be met by a wide variety of players, not necessarily the ones that now provide those services, not necessarily those that already exist, and not necessarily those that are viewed now as part of the court system. The roles of each player may well change radically in such a redesigned court. For example, the case commencement process – currently the clerk's responsibility -- might move to a very different position, one that focused on assisting litigants with the preparation and presentation of their claims.

Understand the Integrated Role of Community Groups, the Bar and Others. An integrated approach to the creation and support of self-help friendly processes will require close collaborations with the bar, community, community organizations, legal services and others. Such collaboration requires a clear understanding of the institutional needs of each group and what each group might offer to the collaborative problem solving enterprise.

The Hearing and Decision Process as the Core. The design process should focus above all on the hearing and decision process as the core component of the court. The other functions and the other steps in that process should meet the needs of that redesigned process.²³ Central to that vision is that meeting those needs requires a comprehensive analysis of what support litigants need in other parts of the litigation process in order to be able to take part fully and meaningfully in the hearing and decision process and reap its benefits after decision.

A Visible Educational Environment. Designers should think of the whole court system, in terms of its processes as well as of its physical environment, as a visible and transparent educational environment. It should be about informing and educating, as well as about deciding.

Analyzing Different Kinds of Disputes and their Resolution needs. An important perspective to keep in mind is the possibility that different kinds of cases require radically different kinds of process restructuring in order to make them realistic for those without

²³ See discussion in detail below at p. 24, and following.

lawyers.²⁴ The problem, however, is that our conception that “one size fits all” is deeply embedded in our conception of courts.²⁵

A Multi-lingual Environment. Designers should realize that the modern court is a multi-lingual environment, and that every stage and every space must be built to be open to people from other cultures and with other backgrounds.

Remembering Issues of Power. Being without a lawyer means being without power in this society. Courts designed for the powerless must fundamentally be about empowering the powerless, by information, by attitude, by protectiveness, and by the design of processes that *in their entirety* provide for the evenhanded application of justice – even when that requires far more from the court than would traditionally be the case. *The test is not symmetry or balance – it is true evenhandedness that takes account of and compensates for differences in situation and for imbalances of power.*

Finally, we Should Keep in Mind the Lessons of Existing General Models Such as Small Claims Courts and Native American Special Jurisdiction Courts and those of the Ad Hoc Situations Such as Housing Courts

As we engage in this process, we must keep in mind the two exceptions to this general courthouse rule of lack of orientation to the needs of those without lawyers: small claims courts and Tribal Courts. In an earlier era of reform, a national small claims system was established. The noble idea – not dissimilar to the thinking behind this paper, but more limited in jurisdictional scope – was to create courts in which those with only small amounts of money at issue could seek relief in a simplified system, with simple papers, with easy procedure, and with quick decisions. The hope was that small claims courts would become an avenue for redress for those without legal or financial power.²⁶ In some jurisdictions such as California, they have indeed played this role.²⁷ They have

²⁴ This is the approach being followed by the National Center for State Courts in its Court Process Redesign Project. This project will focus on a small number of types of cases and attempt, in cooperation with selected courts, to redesign the processes of decision, based on litigant input and pattern analysis. *Meeting the Needs of Self-Represented Litigants: A Consumer-Based Approach*, National Center for State Courts (SJI Grant No-00-N-258)

²⁵ Of course, the recent proliferation of what have been described as “boutique” courts, reflects a growing awareness of the need to customize judicial and support resources, and courtroom processes themselves, for the needs of the situation. *See, generally, What is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 *Judicature* 78 (Sept-Oct 2000); *See also*, www.communitycourts.org.

²⁶ In some jurisdictions, the goal of equalizing power is advanced by prohibiting attorneys from appearing on either side in small claims courts. *See note 27, below.*

²⁷ *See, e.g., Using the [California] Small Claims Court: Basic Considerations and Questions*, State of California Department of Consumer Affairs, available online at: http://www.dca.ca.gov/legal/small_claims/. The success of the California small claims courts is in part because the California Small Claims Act is explicit that “[n]o claim shall be filed or maintained in small claims court by the assignee of the claim.” California Code of Civil

they have, however, been criticized in the past as having become largely simply collection agencies.²⁸

Very different has been the experience with Tribal Courts. Established, and independent, as a result of the Treaties that re-affirmed the existence of the Tribes as independent Sovereigns, these courts often follow very different procedures than the mainstream adversarial U.S. model. Emphasizing consensus rather than confrontation, and building on a common set of cultural assumptions, they remain an alternative model surviving within the overall U.S. legal environment.²⁹

We must take from these experiences the lesson that simplification alone is not enough. What is required is a deep understanding of what litigants need for fairness when lawyers are not there to provide such protection. Tribal courts are grounded in such an analysis. To some extent early small claims courts were designed with a simple minded view that complexity was the enemy, rather than more fundamental imbalances of power.³⁰

It is these lessons that we must bear in mind as we look at each aspect of the court, from building to processes, from staffing to rules, and from filing to enforcement.³¹

Procedure § 116.420(a).) However, in California, financial institutions that purchase retail installment sale contracts for investment, rather than for collection, can use the small claims courts, *id.*

²⁸ See, e. g., Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 Stanford L. Rev. 1657 (1969). (earlier study of California Small Claims Courts).

²⁹ Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 Judicature, No. 3, (1995), on the web at <http://www.ojp.usdoj.gov/nij/rest-just/ch1/reemerge.htm>.

³⁰ See, note 28, above.

³¹ Compare, generally, Goldschmidt and Pilchen, *User Friendly Justice: Making Courts More accessible, Easier to Understand and Simpler to Use* (American Judicature Society, 1996) (containing many helpful suggestions, which, while not focused specifically at the self-help court, apply to it with great force); Engler, *above*, note 20 (broadly analyzing possible changes in role for various members of the court team and concluding that radical changes are required).

Part Two: Redesigning the Physical and Technological Environment

IV. The Courthouse as an Overall Helping, Informing and Deciding Environment

The courthouse is the theater in which the search for justice takes place.³² As such, its physical design, workflow and overall message are critical in both setting the overall tone and shaping or enabling the details of the overall self-help litigation experience.³³

The Entire Courthouse Should be Designed for Maximum Appropriate Visibility By Court Users and Court Workers

The overall design of the courthouse building offers a huge opportunity for education and transparency. The building should be built so that its every aspect informs users and staff about how the conflict resolution process is structured. Everyone who comes to the building should leave with greater understanding about what they need to resolve conflicts. Techniques might include:

- Court rooms and clerks' offices built so people can get a sense of what is going on. Glass walls would meet this goal. Other design techniques that preserved some privacy while creating a sense of openness might be found;³⁴
- Computer monitors throughout the building that show events, scheduling, and underlying substance, such as what the case is about³⁵
- Signage throughout the building that not only accurately labels each location, but explains its role in the case flow
- Signage in front of each area that explains, illustrates and prepares people for what goes on there. Such signage should also tell litigants where they should have gone

³² While technological advances may ultimately dilute the central role of the courthouse, everything that is described here should also apply to whatever electronic analogues first supplement and then replace it.

³³ Compare, generally, Hardenbergh *et al.*, *The Courthouse: a Planning and Design Guide for Court Facilities* (National Center for State Courts *et al.*, 1998)

³⁴ One reported problem with glass fronts is that when a clerks office closes, people may still come in, see that people are working, but that they can not get service, thereby raising tension between staff and litigants. This might be dealt with by clearly projecting explanatory messages, or by keeping the public access point open longer.

³⁵ Such computer monitors are provided at the Midtown Community Court. www.communitycourts.org.

first, and what resources (evidence, money, people, papers, etc.) they need to complete the step associated with that location.³⁶

Every Courthouse Needs A Greeting/Filtering Place

Perhaps the most critical aspect of the courthouse is how people are greeted. Every court user should be greeted with a helpful diagnosis of their problem, and information on where to go, and where to get help. This process should be much more than merely an “information center”.

The space should be central, should be open and relaxing, and be part of the natural flow of people who enter. It should be inside the security perimeter, but completely separate from the security process. In other words, once inside the inevitably off-putting security process, people should be made to feel welcome.

There need to be enough people, resources, and technology resources to provide such information and support fully and carefully for every person who arrives. The staff who fulfill this function should understand the court process, and be well versed in the tools for help that are available. They should have initial handouts, building maps, and resource sheets to give out to litigants and visitors. They should include volunteer guides who can walk a visitor over the right place and hand them over to the person who will provide concrete help.

Every investment in this welcoming stage in the process will be returned several times over in time and expense saved later in the process, particularly because those who find the process emotionally difficult will place less burdens on its operations.

The Building Should be Designed to Reflect the Actual Flow of Cases

The entire building should be designed to reflect the actual flow of cases. For example, if the plan is that most people, the first time they go to the building, should go to a self-help center (separate from the greeting area), then that self-help area should be physically close to the greeting area, as well as clearly visible from it. (First visits to the building are the most important from the point of view of visual clarity.)

Similarly, if the next step for most people is creating or submitting a case, then the place where that is done should be close to those initial helping places; the places where people are helped to prepare for cases should be next, and the places where cases are heard should be close in turn to those preparation places. Finally the places that deal with enforcement should be “at the end of the line”, on the theory that litigants will be better equipped to find such places by the end of the process. (In practice, however, the enforcement help may well be provided by the same people who help at the beginning. Thought should be given to a circular flow in which the end is near or even the same as

³⁶ Of course this signage would not replace, but only reinforce this information being given in other ways, including in person.

the beginning.) If the analysis of the flow shows that people should return to one “helping place” again and again, then that place should be centrally located.

The Design Should Emphasize Minimization of Steps in the Court Process

Consistent with the principle of minimizing steps, the building (and indeed the entire decision making process) should be built to minimize the number of steps that someone needs to take to get resolution.

For example, everything a person needs to do to start a case (including obtaining information, filing in forms, filing forms, obtaining fee waivers, arranging for service, etc.) should be arranged to be available in one place. Each step should preferably require standing in only one line, talking to only one person, filing in one set of forms, and filing one packet of documents, all at the same place. The space should emphasize the idea that one “helping person” should provide as much of the help as possible. This helps give litigants the important feeling that someone is with them and in some sense committed to helping them through the process.³⁷

While following this principle requires, as discussed below, much more than attention to physical design, fragmented physical design can be a major barrier to such integrated processes, and spaces should be built with a view to allowing multiple and flexible services in one physical location within the courthouse.

The Building Should Include Spaces That Allow Both Connection and Privacy

While the public activities of a courthouse should be public, there should be clear design consideration given to the need for private spaces. Indeed, while attorneys can always create private space by force of personality, (or at least think they can), litigants without lawyers need help from the buildings designers who must build locations that invite and facilitate such private space.³⁸ Such private space is needed for consultation with family, friends, coaches³⁹, self-help staff, and community group helpers.

It is particularly important that those who are in violent or near violent conflict are given support from the court in keeping themselves separate from those they fear.⁴⁰

³⁷ This is NOT necessarily the same as feeling that the person is “on their side” in the sense of being against the person or people on the other side.

³⁸ However, such private spaces must be carefully designed to prevent the possibility of intimidation. When new Housing Courts were being built in New York, the courts were careful to make sure that private conference spaces had glass doors.

³⁹ See discussion below at p.41

⁴⁰ It has been established that periods in which divorce or separation are sought are times of high risk for domestic violence victims, Mildred D. Pagelow, *Family violence*, 43 (Praeger, NY; 1994)

The Courthouse Should Be Built to Ease and Support Integration with Other Problem Solving Resources. Similarly, Related Resources Should be Housed Closely Together

It is now well recognized that long term solutions to the needs of self help clients will not come from the court alone. The courthouse should be a flexible open environment in which community and other support groups can find space. Courts should make spaces available to any groups that have a realistic possibility of assisting self help litigants.

In order to protect themselves against abuse, they should develop standards and codes of ethics for such groups, but beyond that, should be willing to offer a bazaar of assistance programs. These standards should be written to protect both the neutrality of the court – requiring programs to respect that role, and to emphasize that their use of the space constitutes no endorsement by the court of the program – and that of the programs themselves – allowing the programs to retain the programmatic independence. Some suggestions:⁴¹

- Explicit standards as to the level of service that a program must provide before being able to use court space;
- A commitment that litigants who cannot be assisted by the program due to income eligibility, perceived conflict, etc., must be referred to an appropriate resource. The court should attempt to ensure that all sides of a case receive as similar service as possible;
- A commitment to work in collaboration with other self-help providers in the building. This should include regular meetings, commitments to make referrals to other providers and to discuss service concerns;
- A commitment to make all handouts, videos, and any other materials other than one-on-one services available to all litigants (not just Those meeting the program's demographic criteria);
- An agreement not to encourage the filing of pleadings that abuse the process itself, and;
- Clarification of the right of the court to control space and move programs as necessary and to ask that programs leave if they are not able to work out issues with the court, or if they do not maintain the explicit service standards set out by the court prior to their obtaining space in the courthouse.

⁴¹ Thanks for Bonnie Hough for these suggestions. It is also pointed out that when programs serve all parties in a case there is less likely to be resentment of the court's role in facilitating the presence of the programs.

More generally, this “bazaar” concept might indeed be useful in describing the physical space that should itself emphasize the range of help available, and the independence of that help from the court. Litigant assisting programs not officially sponsored by the court might well be better off not, for example, sharing the receptionist – welcoming system with the court and its direct services. On the other hand, easy referrals from the self help center to these programs – and a physical layout that facilitated these referrals -- would help clients and the court.

The Building Should Be As Accessible As Possible, and Should Be an Educational Environment Promoting Access Technologies

It should go without saying that the building should take full advantage of every technology of access, such as ramps, infra-red transmission of sound, speaking of written text for the blind, etc. Moreover, these technologies should not be hidden -- rather they should be displayed. A visible commitment to physical access should bolster the strength of the commitment to legal access. This commitment includes easy and visible access to phone interpretation, and multi-lingual computer help, including of decision tools.

Similarly the building must be located in an easy to reach location, and one that is not regarded as within the “turf” of any group.

The Building Design Should Maximize Flexibility for the Future

These building design principles lead to one overall conclusion: the compelling need for flexibility in the building design. The broader the range of resources and possible flows of clients and cases in the court, the less likely that the original design will remain appropriate for long into the future. It is worth investing significant resources in maintaining flexibility. This means open spaces, movable partitions, flexible ductwork for utilities, including electronics, and spare elevator and escalator capacity.

V. Designing the Courtroom Itself for Helping, Education, and Equality

The Courtroom Should Be Built to Facilitate an Ongoing Educational Process

The courtroom should be designed to turn it into an educational environment. Every aspect of the design should be built so that every interaction and every piece of information is shared and explained in such a way that every litigant learns about the procedure and the substance from every case that he or she observes. Obviously, each person in the “audience” should see and hear the parties – particularly the judge. The judge should be given the tools to make what he or she is saying and doing clear and visible to the parties. If, for example, the judge is citing a rule or statute, or working through a visual decision-making template, then that reference to the text, and the template itself should be visible to the audience.

Seating that clusters around the bench, slightly tiered seating as in an auditorium, clear lines of sight, good acoustics, and a (slightly) raised bench and area for the parties all add to this feeling.

Projecting Information On the Wall Maximizes Access

One valuable technique might be using a computer projector to show on the wall, visible to all, crucial tools to help in resolving the case. For example, if the judge were using the branching decision-making templates described below,⁴² then those templates could be projected onto the wall, with the step with which the court and parties were engaged highlighted for all to see. If legal authorities were being discussed, the text of those authorities could be projected and appropriately highlighted. While the judge was explaining the template or the law, animations and graphics could help the audience – and the parties – understand the underlying rules and process.

Such a visual wall could also show the parties the process of the calendar, telling people how long they would have to wait until their case was called.

Similarly, if the judge referred the parties to other parts of the courthouse, the wall could at that point show everyone a map of how to reach those locations.

Individual Display Systems Could Allow the Audience to Follow Their Own Information Needs As They Watch Proceedings

Expanding further on this concept, each court user – including people in the audience – could have their own individual viewing screen, or rather an addition to the common the wall, as the viewing point.⁴³ Special software could give each viewer control over their personal screen. A viewer, for example, who was viewing a decision making template, and wanted to look at the law underlying a particular step, could touch the screen and follow a link to do so. This information could itself lead to further information and assistance tools – including referrals to community organizations and on-line self-help resources.

Educational Tools – Including Preventive Legal Educational Tools -- Should be Built in

Built into these systems should be access to the broad range of legal educational tools. These tools should be designed to take what was happening into the courtroom and use it to deepen the understanding of the audience. In particular, an attempt should be made to emphasize preventive legal education – how people might in the future take steps that if taken might have helped them avoid the conflict which had brought them to the

⁴² See below at p.49 *et seq.*

⁴³ Such an idea might seem absurdly expensive. However, only a few years ago, the idea that there would be a PC on every desktop in an office seemed similarly impossible to imagine.

courtroom. (Design and writing skill will be needed to prevent these materials from appearing to criticize those who have indeed ended up in conflict situations.)⁴⁴

The Design Should Appropriately Balance Transparency and Privacy

This transparency of design should extend to sufficient detail about the process to involve the audience in each case. It should not be such as to intimidate the parties from effectively presenting their cases. Judges might consider it effective to explain before a session the transparency principle of the court, particularly in terms of the educational purpose of sharing what is happening. They could provide the parties with the option of requesting that certain of the transparency options be turned off.

Power Issues Must Be Faced and Resolved in the Court Room Design Process

Traditional courtroom design emphasizes the power of the judge.⁴⁵ It would be appropriate to think of ways of laying out the courtroom so that the parties would be at least conceptually treated as fellow problem solvers, engaged in what is not always necessarily a zero sum game. This might be achieved by seating parties and the judge in a circle, by having them at the same level, or by placing them in the center of the room (possibly with the audience all round).

The Courtroom Should be Physically Shaped for Interaction, Quality and Learning

The ultimate goal, therefore is simply to create a physical space in which education and interaction, including true listening, is maximized, and needless conflict and distancing is minimized. Since there are no attorneys to lubricate that process, litigants, as well as the judge, have to take more responsibility for resolution finding and accepting.

Litigants should be speaking to each other as well as the judge, others in the courtroom should be engaged in what is happening as an aid to understanding, and perhaps even resolving their own cases.

All of this is helped by light, spacing, levels, background, sound quality, line of sight, and commitment to effective use of space.

⁴⁴ It might help to emphasize how easy it is for these conflicts arise, how frequent they are, and how many people fail to take the recommended steps. It is also useful to emphasize those resources that do not require investment in a lawyer.

⁴⁵ The judge sits higher than the "people." Behind "him" stand the flags, symbols of the authority of the state. The (generally) two parties sit on each side emphasizing the fact that the judge sits in balancing power between them. Surely a judge with the whole power of the law behind her or him should not need a few extra inches to maintain that authority.

The Courtroom Should be Integrated with Helping and Meeting Spaces to Maximize Interaction

The courtroom should be built as the focus of a broader multi-space helping environment. There should be a variety of different sized meeting and gathering rooms directly off the courtroom, so that small groups can adjourn for discussion with the self-help staff, with community groups, or with the parties.

These rooms should be built so that they are part of the courtroom cluster, with access only through the courtroom and they should provide both privacy from and visibility to, the courtroom. They should include the full panoply of technological tools to allow for individual or collective review of the case. (It might make sense to pipe sound from the courtroom into the rooms, to alert people when they were needed in the courtroom, but allow for that sound to be turned off when distraction needed to be avoided.)

Courtrooms Must be Kept Flexible for Different Kinds of Cases and Over Time

Just like the building, the courtroom should be built so that its layout can be changed from case type to case type and over time as understanding of needs changes. Bench, desks and audience seats should be movable, the height of the floor for different parts of the courtroom should be modifiable,⁴⁶ barriers should be easy to install and remove. Wiring and conduits should be built so that the electronic information systems can easily be moved around with the desks and locations. Lighting should be similarly flexible.⁴⁷

As we learn about how to make courts work in a variety of contexts, we will need to add (or maybe remove) players to or from the courtroom team. If our infrastructure does not easily support such changes, we will be locked into yet another dead end.

VI. Technology for Information, Analysis and Facilitation

It is no news that innovative use of technology can assist throughout all the steps of the process. For each step in the processes described below in Part Three, we need to ask whether we have, to the extent possible, used technology to achieve each of the goals of accessibility, information, and empowerment of court users.

⁴⁶ Floor height could be made modifiable by building the base floor flat, and then adding in easily dissembled blocks to raise whichever level of floor was needed to be raised.

⁴⁷ Theatre lighting systems permit very rapid preprogrammed changes. Such changes help modify the focus of the courtroom for different kinds of cases, allowing the designer to influence the patterns of relationships between the parties, the judge, and others in the courtroom.

Technology Systems can Inform, Assist, Narrow and Support

If a court is to work for those without lawyers, it must use elaborate and sophisticated Internet-based information systems to explain underlying law and procedure and guide through the steps those who want to obtain their rights.⁴⁸ The great advantage of using Internet technology is that this informing step does not need to be at the courthouse, does not need to be in use at any one point in time, and can be structured to require minimal or zero day-to-day staff input, at least when used by generally informed and technologically confident people.⁴⁹

Simply put, these systems are large branching diagnostic systems of questions and information, in which the information can be provided in a wide variety of media, text, pictures, voice, video, and animation.⁵⁰

These systems must be open and transparent and they must be organized in the terms that lay people think about their problems, not the way lawyers do. They must assist with concrete problems, rather than inform generally. A “*Handbook of Guardianship*” does not work. An on-line list of problems and questions like “*A family member can no longer manage their money properly,*” does work. These systems of questions and answers must be comprehensive.⁵¹

These systems must be built to narrow issues. On line question and answer systems can be built to diagnose, step by step, from a general statement of a problem to a specific procedural recommendation accompanied by a customized statement of the relevant law and of steps to be taken.⁵² In order to maximize comprehensibility and ease of use, these systems should generally include only one “step” of analysis on each screen or web page.⁵³

⁴⁸ Some of the best systems currently in place include those listed by the National Center for State Courts, note 11, *above*, at page 4.

⁴⁹ Moreover, the rapid enhancement of the human-to-network interface through touch screens, voice recognition, eyeball monitoring, and other technologies is extending this benefit to less and less technically sophisticated groups. For a general discussion of the impact on self-help and the law of these changes, see, *New Technologies with Implications for the Legal Services Delivery System*, <http://www.equaljustice.org/visions/TechConf/01newte.htm>.

⁵⁰ An advanced use of video can be seen at <http://i-can.legal-aid.com>, a project developed by the Legal Aid Society of Orange County (California)(Internet Explorer browser only).

⁵¹ This writer believes that there are particularly important opportunities for collaboration between courts, legal services programs and community groups in the development of these systems. See, www.zorza.net/legalinfo for a series of reports and recommendations on these possibilities, and for a parallel proposal for a menu of on-line problem-oriented questions.

⁵² See, e.g., www.fcnv.org/housing.

⁵³ See, e.g. www.fcnv.org/nydv.

Of course, since the question and answer diagnostic process has gathered the key data about the case, the final product of these systems can be the legal document required for filing.

At a minimum these systems narrow issues, bringing before the court only the legal theories and facts that fit together to create a cause of action, not the undifferentiated complaints of the petitioner. The parties can then be much more fully educated, on or off line, about these narrower areas of law.

The Systems can Minimize Repetition and Duplication

Such systems mean that once a user has entered a piece of information once, that information is held in memory, and never needs to be reentered. It can be printed out in numerous documents and different contexts and can be used to guide the branching logic in a wide variety of future situations.⁵⁴

The Systems can Place Law and Facts in Context and Show Consequences and Alternatives

A more ambitious use of technology is that it allows each case, and each step in a case, to be put in context. That is to say that information analysis and display systems can show the litigant, the judge, and the case processors how this case compares with others, how choices made by the litigant and other players can affect the outcome, and how these choices interrelate.

Moreover, this comparison and display can be used to narrow the choices faced by the litigants, and to facilitate the display of those choices so that they make sense. A system that helps a litigant understand the law of, and assemble the answer for, eviction defense, could, for example, make use of dynamically updated statistics on housing code violations in different kinds of housing to suggest the possibility of those violations in his or her house to the litigant preparing the answer.

Similarly, internally generated statistics on effectiveness of defenses could be used to weigh the choices that were offered to the litigant.⁵⁵

Even without such sophistication, however, technology-based systems can display alternatives and patterns or outcomes much more easily and effectively than other kinds of information systems, and can be updated automatically. For example, showing a litigant what percentage of housing code defenses influence the outcome would be a powerful tool in effective preparation.

⁵⁴ Of course there are complex issues of privacy and security that must be considered in building any such system.

⁵⁵ The role of the court in using such techniques might raise judicial neutrality concerns. Such concerns might be dealt with by entering into appropriate collaborations with advocacy organizations which could take responsibility for these aspects of the system.

Facts Should Be Gathered and Summarized Electronically

Implicit in this model is the idea that facts should be gathered electronically – which is another way of saying that cases should be filed, tracked and decided electronically and that systems should import information from related institutions that are relevant to the issues at stake. Some examples and ideas (some of which might require changes in state or federal law) include:

- In divorce and child support cases, tax records (and maybe bank and credit card records) should download automatically into the court system for viewing and analysis by court and parties;
- In child custody cases, school records should be downloaded into the court's computer;
- In housing cases, any records relating to the unit, the building, and the landlord should be downloaded into the court computer from the code enforcement, property tax and other related computer systems, and;
- In small claims, debt type cases, similar appropriate history should be downloaded.

Moreover, all the systems that support input, display, and analysis of this information must be totally user friendly. E-filing, docket reporting, case display and case context analysis systems must be designed from day one so that they require no legal understanding for effective use.

The screens must explain the choices and the law, must gather the data, and must show users where they are in the process, and the consequences of any choices.

To the extent that e-filing or other systems are developed by outside vendors, this front-end friendly aspect must be a contract and RFP requirement.⁵⁶

Provide Information and Filing Access From Home/Office and Community Organization

Technology must be exploited to extend the courthouse as a justice-providing space into the community and into the home and workplace.

Any process that does not require actual physical presence in the court building can be delivered over the net to a wide variety of locations. Moreover, those processes that do currently require such presence should be rethought. Biometric identifiers can

⁵⁶ The importance of this moment in e-filing history can not be overstated. If states allow vendors to provide attorney-oriented systems, it will be very hard for us to end up with user-friendly courts. The front end intelligent data gathering systems are expensive to build. Huge investments are being made, with huge anticipated payoffs for the private sector, and the time for making sure that these systems work for non-lawyer users is now.

remove many of the identification and proof concerns that lead to the presence requirement. In those situations in which presence is currently required for confrontation purposes, thought can be given to whether it is formally needed in the case (as when either facts or credibility are not in issue) or whether in any event parties may wish to waive the requirement.⁵⁷

Maximize Transparency, Visibility and Educational Aspects of the Process

Technology can also be used to optimize the visibility and transparency of the process. Not only can broad information about each case be communicated, but it can be done in ways that increase understanding of underlying patterns. An on-line docket system, which shows the list of papers filed, is one thing. A system with explanations and educational links built in is another. A system in which the legal documents themselves are accessible and linked (with appropriate confidentiality) is yet another. One in which everything is built as a tool to educate the user of the court how to proceed in their own case achieves even more.

Needed: A Comprehensive and Integrated System

To take advantage of these more ambitious aspects of the technology, the system must be comprehensive and integrated, acting not just as a tracking system, but as the information lifeblood of the court, with the understanding that access to information is not just about making each litigant's experience simpler, but is also about creating an overall educational environment.

Moreover, as with other physical systems, the core must be highly flexible, and built for constant change as we understand more and more of what is needed and possible.

⁵⁷

This writer is skeptical as to whether electronic presence really is the same as physical presence for confrontation purposes. Having tested legal arguments over video links, he found the experiences somewhat unnerving. There is an urgent need to conduct research on what information is and is not communicated without physical presence.

Part Three: Rethinking The Process Step by Step

VII. Rethinking People and Case Flow

The Overall Process Should Be Redesigned to Minimize the Number of Steps That the Litigants Must Take

The entire process should be built to minimize the steps through which a litigant must go. Similarly, each step should coherently and completely encompass a necessary and necessarily separate stage in the process.

Each of the steps, once identified, should be fully integrated – that is to say, that a litigant should be able to complete the step in one place, on one occasion (whenever possible), with the same group of people, and with closure at the end of the step.

The Steps: Learn, Analyze, Submit, Prepare, Present and Confront, Decide, Enforce

The steps might best be broken down as follows:

Learn. The Learning Step is merely the gathering and processing of information about the law, and the processes that will be required to obtain relief.⁵⁸

Analyze. The Analyze Step is the application of fact to law, the step in which the potential litigant figures out what he or she to do to obtain their rights, what needs to be presented to the decision maker, and finally decides between options. In the case of the opponent, this occurs after the receipt of the initial litigant's submission.

Submit. The Submit Step in the traditional process is the filing of the case. It is the step in which the litigant presents the core of the case to both decision maker and opponent.⁵⁹ Traditionally, the opponent is also required to make a similar, but later submission.⁶⁰

Prepare. The Prepare Step is the one in which the litigant (and opponent) marshals their facts for submission to the decision maker. This step need not be separate

⁵⁸ In this analysis, learning is suggested as a separate step from analysis since it can often be done in a different place, with different people, and using different technology than the more complex analysis phase. Analysis, for example, is much more likely to require the assistance of an attorney.

⁵⁹ Of course in different jurisprudential eras, the specificity required has varied greatly, as has the range of consequences from non-inclusion of particular claims or facts.

⁶⁰ In some self-help-oriented systems, the opponent does not have to make any more than a nominal submission.

from the analysis phase, except in that it needs to have available the opposing side's material.

Present and Confront. This is the key phase during which the information is presented to the decision maker. It operates under the constitutional requirement of confrontation.

Decide. Here the decision is made and communicated.

Enforce. This step is the most frequently ignored in self-help innovation. It is the one in which relief is actually obtained.⁶¹

Each Step Should be Built so That it Prepares the Litigant for the Next Step

Many of the problems that self help clients face come from the fact that the relationship between the steps confuses them. The case loses momentum between each stage, and has to be restarted several times during the case, often with prejudice to the litigant and cost to the court. Therefore, each step, as described below, should be set up to educate the litigant about the successor step, and about what, if anything, the court user needs to do to get that step moving. (It should go without saying that the amount the court user has to do should be minimized, and the courts systems should facilitate the movement of the case from one step to another.)

Among the ways this might be done include the following:

- At the end of each “step” giving court users a sheet telling them about the next step and anything they need to do to move to that step;
- Having visual charts in the halls (and maybe the courtrooms) showing the relationship between the steps;
- Assigning colors to each step, with materials, courtrooms, lighting, forms, webpages, etc., all color coded for the step;
- Including in every court form an explanation of which stage it relates to, and how to move to the next stage;
- Including in the court proceedings a statement from the judge about the next step and how to get there, and;

⁶¹ See statistics at note 118, below. The inadequacy of these statistics highlights our collective ignorance about the way the system really functions. The gathering and analysis of such statistics should be a key component in an evaluation strategy.

- Making sure that there is a common understanding among all the court team of the relationship between the steps, a common nomenclature, and common instructions to give litigants.

Wherever Possible, Continuity of Location, Staff and Timing Should be Maintained Between Steps

While clarity of delineation between the steps should help the self-help litigant understand the process, wherever possible there should be continuity between the steps. The fewer persons the litigant has to deal with, the smaller the chance for confusion and alienation. The more frequently the litigant knows, before returning to court, who she or he will be dealing with, the less likely that he or she will be intimidated from returning. Possible techniques include:

- Each litigant could be assigned a “personal clerk” in the office that manages submissions;
- Individual assignment systems -- in which the same judge keeps the case from beginning to end -- should be heavily favored, and;
- When cases have to be adjourned, they should be brought back on the same day of the week, and the same court personnel should be on duty. This would have the added advantage of bringing the same litigants together each time, making it easier for them to support and help each other.

Self-Help Counselors Might Become Flow Counselors

More ambitiously, a court might expand the self help counselor role to that of “flow counselor.” This group of people would talk to court users between each step, re-diagnosing the users situation, making sure that the right intermediate steps were completed, and monitoring the readiness of the case for the next step. The flow counselor might work with all parties in a case, increasing efficiency, and making clear the absence of any attorney client relationship.

VIII. Beginning a Case (Inform, Analyze, Generate, Submit)

The Court Must Build Systems that Provide the Broadest Possible Information Before the Potential Litigant Even Comes to Court

For a court to be truly self-help friendly, it must take upon itself the responsibility for creating an educated community -- a community in which everyone understands at least the broad contours of their rights. If people understand their rights, then they will hopefully avoid many of the conflicts that currently escalate into courthouse feuds. Some of the techniques could include:

- Regular and comprehensive court-sponsored educational programs in schools, community organizations, etc;

- Sophisticated web sites that explain the law regardless of educational level or circumstances;
- Booths and educational services at gathering places such as state and county fairs, parades, etc., and;
- Free volunteer training systems so people can be trained as "community helpers" -- and given the certificates to prove it.

Many of these kinds of innovations may be low cost, particularly when they can be organized through bar and legal services collaborations.

A self-help court should be able to pass an information audit in which the court is tested for how all its activities are geared to an overall increase in the legal understanding of the community.⁶²

Most particularly, however, the court should have produced, either on its own or in partnership with other organizations, a comprehensive legal information system – paper and on-line – that is a trusted source of neutral and helpful information within the community on critical legal issues.⁶³

Moreover, for those who come to the court itself without having been able to take advantage of these systems, the court should have an easy to find, well-staffed self help center that engages with many call their customers, giving them the specific context-specific help that they need. While the costs of these centers can be kept down by the use of volunteers, and with extensive printed materials, in the end there is often no substitute for person-to-person information.⁶⁴

The Court Must Provide Technological and/or Human Help In Analyzing The Case

As described above, those who have built self help programs find, perhaps not surprisingly, that information is not enough, that court users need help in analyzing, in applying the facts (that they know or think they know themselves) to the law that they have learned from the informational part of the courthouse. The self-help courthouse will have to include tools to meet this need. Amongst the possibilities:

⁶² The creation of such an audit protocol would be an appropriate task for the National Center for State Courts, in collaboration with other organizations.

⁶³ For thoughts on how such a system might be structured, *see*, www.zorza.net/legalinfo.

⁶⁴ While there are, of course, issues at the boundary, there is little disagreement that for courts to fulfill this role raises no ongoing neutrality issues. Greacen, *above* note 19.

- Attorney court staff who are defined as not in an attorney client relationship with the court user;⁶⁵
- Volunteer unbundled lawyers, with such a relationship, made possible by relaxed lawyer ethical rules;⁶⁶
- On line model analysis templates that walk the user through all the possible factual circumstances, creating not just the pleading, but the legal analysis of what needs to be proved, the ways of proving it, and the implications of the pattern of facts and law;
- Off line templates show the users (by charts, perhaps on the wall) the steps to understanding the relationship between facts and law in the most common kinds of cases, and;
- For either kind of template, the final product should be a customized booklet with the analytic information the user needs, but not cluttered with material irrelevant to that person's circumstances.

One Possibility Would be True Notice Pleading in Which Each Party Would Narrate Relevant Events to a Court System, and a System of Court Staff Would Unravel the Narrative into Decision-Ready Form

The most radical possibility would be to go to true notice pleading. The plaintiff would “tell their story” on paper, by e-mail, by phone to a tape machine, or by some other technologies not yet thought of.

The narrative would be delivered to the opposing party by the court or its staff or its technology.

The respondent would then respond by telling their story, also by using of the above technologies.

⁶⁵ The California Courts have moved furthest with this model. See note 10, above at p. 4. 14 California Family Law Facilitator Act § 10013 (“No attorney-client relationship is created between a party and the family law facilitator The family law facilitator shall give conspicuous notice . . . which shall include the advice that the absence of an attorney-client relationship means that communications between the party and the family law facilitator are not privileged and that the . . . facilitator may provide services to the other party.”). See also, California Family Code, § 15010 (description of pilot project).

⁶⁶ Specifically, American Bar Association, Model Rules of Professional Responsibility, Proposed Rule 6.5. Compare, generally, Forrest Mosten, *Unbundle Your Law Practice*, note 12, above, Chapter 6, *Ethical and Malpractice Barriers to Unbundling: How To Deliver Discrete Task Services Without Being Sued Or Disciplined*, <http://www.zorza.net/resources/Ethics/most-ethics.html>.

A court staff person might then (and only then) prepare an analysis of the claim and response, including what additional information from each side might be relevant. This would go to each side, and each side would respond with that information.

The court staff would then decide if there were any legally relevant factual dispute and if not prepare a decision for the judge to approve.

At that point, the judge might or might not call the parties in, either for an explanation of that decision, or for the hearing of factual disputes.

The Court Must Develop Easy-to-Use, Fully-Integrated Submission Systems

Assuming the need for more formal data gathering by the court, the formal gateway – the submission pleading – must be as easy to use and as comprehensive as possible.

It might be the single packet. It might be an on-line form integrated with e-filing.⁶⁷ It might be a volunteer at a desk with a computer who walks the litigant through the on-line form. More creatively, it might be a branching check-the-box system, designed to include a wide variety of different problems.

Any of These Systems Must Include Automatic Service of Process or Equivalent in Which the Court Takes Responsibility for Completion of the Function

In any event, the system must provide for automatic service of the initial pleading on the respondent/defendant. This could be done in a number of ways:

- Most traditionally, the court could have a process-serving staff, with a fee that is waived for low income individuals, and collected automatically from the loser at the end of the case;
- The court could mail service to opposing parties, with the option of waiver of service⁶⁸ and a fee imposed if the court's server had to go out and provide personal service;
- The court could telephone or e-mail the opposing litigant at a number or e-mail provided by the plaintiff, and be given a number of options, with differing financial implications, or;
- The court could provide community volunteers who would go out with litigants to help them perfect service.

⁶⁷ See, Robert Plotkin, *Electronic Court Filing, Past, Present and Future*, Boston Bar Journal, May June 2000. <http://www.bostonbar.org/bbj/electronic.htm>.

⁶⁸ See discussion below at p. 63

Most of these could be achieved, depending on the local situation, without legislative change. Other changes would be more radical and would probably require legislative change.

- Use of registered mail service without showing inadequacy of personal service;
- E-mail service provided the plaintiff can show that the defendant has responded to an e-mail sent to that address within the last month, and the service e-mail does not bounce, and;
- E mail service, combined with information, obtained from the Internet Service Provider, that the respondent has been downloading e-mail from that (password protected) address.⁶⁹

The Systems Must Help Litigants Request Highly Specific Relief

As discussed below in more detail⁷⁰, one of the major holes in the self-help system is actual enforceable relief. Because most self-help litigants do not understand the system, they do not ask for the highly specific relief that would often be most useful to them or to police and other governmental agencies in providing actual enforcement. Moreover, even those clerks and court staff who are most willing to be helpful to self-help clients are⁷¹ particularly unwilling to help people think through what relief they need.

So, the system which helps with the submission, regardless of whether it is on-line or a human being, must be designed to bring out from the self-help plaintiff what is needed to remedy the situation. Some such questions (on or off line) might include:

- What would you need to put you back in the same situation that you were before the problem developed?
- What is the total value of the injury or hurt that you have suffered? What would it cost to put it right? What other financial costs do you think it will cause you?

⁶⁹ It might be necessary to have the plaintiff state by affidavit that he or she has not caused this download themselves. (Where the parties have shared house and computers in the past, they may well know each other's passwords.)

⁷⁰ See below at page 58, and following.

⁷¹ They view such assistance as providing "legal advice." In New York City, for example, Family Court clerks, who actually fill in petitions seeking protective orders for domestic violence victims, commonly include a general boilerplate line asking for appropriate relief, but do not engage the victim in any specific discussion of the threats and risks of the situation. The computer system designed to remedy this system can be seen at www.fcnyc.org/nydv. It is described in *The Internet-Based Violence Court Preparation Project: Using the Internet to Overcome Barriers to Justice*, Zorza and Klemperer, 4 Domestic Violence Report 4 (1999).

- What do you want the defendant to be ordered not to do in the future?
- Do you want the court to enter any orders that will freeze the situation and stop things getting worse for you until the judge makes a final decision in this case?

Which questions should be asked, how they should be asked, how they should be elaborated and varied, and what warnings or limitations should be given will vary, of course, with the case type and jurisdiction. In domestic violence cases, for example, much more detailed questions about risk, fear and past conduct should be used to provide the specific requests for relief that will make possible the kind of more detailed protective orders which are in turn easier and more effective for police to enforce. In small claims cases, damage and offset calculator worksheets, on or off line, would be appropriate.

To the extent that users chose, in the interests of speed or for other reasons, not to seek for relief to which they might be entitled, the court (through technology or otherwise) should find a way to help them think about whether they might want later to exercise their rights to obtain such broader relief.⁷²

The Case Starting System Should Include Alternative Referrals

It has long been a truism within the court innovation movement that many cases end up in court that should be resolved in other ways. The cases that it is considered should be diverted outside the court system fall into two major groups, those in which the conflict between the parties is resolvable by means other than zero sum litigation, and those in which the dispute is not really between the parties. An example of the first is a visitation dispute that has got out of hand. An example of the second is an eviction triggered not by any omission on the tenant's behalf, but by the welfare department's failure to mail a timely check.

In either case what is needed is a component in the case starting system that helps those who want to follow an alternative path to do so, but does so without forcing any who are reluctant into such an alternative path, and does so without prejudicing any long term rights to broader relief.

Therefore, at each step of any diagnosis, on or off line, users should be given information about whatever alternatives might be available. The referral should be easy and not have complex legal implications or requirements. The referral should include realistic information about likely outcomes, and criteria for appropriateness. The court should provide resources to help people figure out whether such diversion would help or hinder litigants in meeting their goals.

⁷²

An example is in the domestic violence context, in which a victim might very reasonably choose, in the interest of speed and simplicity, not to pursue child support. The computer program used to generate the pleading should provide this option. However it should also print out a reminder telling the petitioner of the right to return to court to obtain support.

Whenever possible, the organizations that provide the alternatives, whether through assistance in the dispute resolution or in resolving the underlying problem, like lack of resources, should be physically present in the courthouse, and easily accessible to litigants who are considering such diversion.

Submission Systems Should be Designed to Help the Litigants Gather as Much as Possible Into Each Step, Minimizing the Need for Multiple Returns to Court at Any Stage.

Given how frequently cases disintegrate into endless continuances because of missing evidence, new claims or counterclaims, and the like, and given that self-help litigants can not rely on the attorney to package as much as possible into the submission, particular effort must be made to expose the self-help litigant early in the process to the full range of information likely to be needed, and the full range of directions in which the litigation could go.⁷³

Filing and Response Fees Should Never be a Barrier to Protection of Rights

Filing and response fees present a major barrier to access to the courts for many people. Setting aside the general question of whether there should be a user fee for justice, there is surely agreement that any self-help friendly court should be set up to make it as easy as possible for litigants to obtain fee waivers.

Such waivers should be obtained with limited information, should be available automatically for large categorical classes (such as those participating in public benefits programs,) and should be issued, at least preliminarily, by court staff other than the judge.

The granting of the waiver should be instantaneous with the initial filing, and should not require any additional step by the litigant.⁷⁴

Electronic filing provides particular problems for fee waiver. Usually e-filing requires a credit card, and, of course, many of the self help litigants do not have a credit card, let alone one that can absorb a filing fee. One solution is to allow filers, instead of giving credit card information, to fill in the fee waiver form, with the understanding that allowance of the waiver is subject to court review, with the litigant potentially later being given the choice between paying the fee or having the case dismissed.

⁷³ On the other hand, it is much less likely that the self-help litigant will engage in tactical delay by fragmentation of claims, lack of evidence, etc. The exception, which must not be ignored, is certain frequent self-litigators, such as abusive spouses, who may use the court for purposes of harassment.

⁷⁴ One court self help program, otherwise a national model, at one point required those in need of a fee waiver to go separately up to the courtroom to find a judge and obtain the waiver.

Systems Must Also Protect Full Participation by Respondents

The case starting system must similarly be built so that easing the filing and service requirements do not increase the barriers to participation by the respondent. On the contrary, the court must make response as easy as case initialization. The case initialization process itself must be built to make it as easy as possible for the respondent to respond to that initialized case. Some ways this might be done:

- Require that initial pleadings be fully comprehensible. This might be done by requiring the use of standardized forms, or by requiring review by the clerk's office of the outgoing pleading for comprehensibility;
- Generate the initial pleading on an interactive website, and allow the respondent to go to a web site to respond in a structured way to the specifics of the allegations;⁷⁵
- Require that within the initial pleading be a form that the respondent can use to answer;
- Require a notice in the initial pleading that one can answer by telephone or e-mail or in person without a pleading;
- Require the inclusion in the initial pleading of how to obtain help on how to answer the pleading;

IX. Responding to a Case

Many of the techniques and suggestions that are appropriate for the preparation of the initial pleading apply also to the responsive pleading.

However, analysis of a response is usually more focused than the creation of the initial submission pleading, since the plaintiff has to a certain extent narrowed the issues. (Although the respondent may well need to add counter claims and defenses that go beyond the scope of the initial pleading.)

Ease of Filing and Serving the Response Should be Maximized

Ease of responsive filing is conceptually easier than that for the initial filing, since summons and service requirements are usually easier for responsive pleading than for the initial pleading. Possibilities:

- In person, e-mail or phone response to the pleading, with the court taking full responsibility for notice to the filer of the initial pleading;⁷⁶

⁷⁵ An advantage of this is that it allows the court to look at allegations and responses on an integrated screen, driven from an integrated database.

- Kiosks that walk people through the answer generating process, and;⁷⁷
- Volunteers and/or self help staff that help people understand the initial pleading.

Information and Analysis Help

Analysis help is as critical for the development of a responsive pleading as the initial pleading, and the same techniques can apply.

However, each of the options for analysis help will need to be more specifically customized for analysis by the respondent. For example, Analysis Templates will need to be available for the range of claims brought by plaintiffs and for, each of these, for the range of general responses that might be available.

Responding litigants will need ways of leaning about, and choosing between the wide range of possible responses and counterclaims. In particular, it must be noted that most self-help litigants have no conception of the rules governing counterclaims. It is probably a safe generalization that most self-help litigants regard the scope of counter claims as being much narrower than it actually is. For many, the concept of a counter claim may be counter-intuitive. All the systems must include broad enough questions that bring out the range of possible counterclaims. Naturally these will have to depend on state law.⁷⁸

- Were you harmed in any way by the actions of the plaintiff in this situation or in any situation related to this?
- Were you harmed in any way by the plaintiff in any other situation?⁷⁹
- What was the value of this harm? (how much has this cost you in money, or in other costs?)
- What would you like the court to order the plaintiff to do or not do?

⁷⁶ The New York City Housing Court, for example, already has in place a system by which eviction defendants are talked through a check off form which acts as the answer. The Court then sets a hearing date, and simultaneously provides the defendant's response and the hearing date to the landlord petitioner. An on-line prototype for assembly of this form can be viewed at www.fcnyc.org/housing.

⁷⁷ The complexity of these systems is made worse by the need for an on-line diagnostic system to help the user figure out what the plaintiff's claim actually is.

⁷⁸ The result may be to make self-help cases more, rather than less, complicated. However, such assistance is surely required by fundamental access to justice principles.

⁷⁹ This will require clarification as to the state-based limits on such claims.

The Court Should Help Responders as Much as Initiators Evaluate and Consider Settlement Options, as Well as Alternative Methods of Resolving the Problem

One of the great advantages of having an attorney is that the attorney can explore settlement options – or alternative dispute resolution options – without signaling surrender to the other side. Moreover, an attorney can provide valuable help to the litigant (on either side) in providing perspective in deciding whether to settle or whether to pursue alternative dispute resolution methodologies.

Self-help courts need to develop alternative ways of providing these settlement evaluation services to litigants. Among the possibilities:

- Unbundled attorney consultation,⁸⁰ paid or pro bono;⁸¹
- Non attorney volunteers with appropriate experience;⁸²
- On line outcome predictor systems. These would, based on the facts of the case (such as, for example, in a landlord tenant case, amount of unpaid rent, and number, type, and size of counterclaims) give a statistical prediction of outcomes. Some of the problems associated with such systems might be lessened if they were operated by the volunteers described above;⁸³
- Video and other materials explaining how to evaluate a settlement proposal, and;
- Software that helps evaluate the value of the proposal.

Of course these materials and resources should be available to both sides.

⁸⁰ For additional information on the concept, *see*, Mosten, *supra*, note 12.

⁸¹ In the view of this writer, this evaluation and recommendation is the most clearly within the traditional definition of practicing law, within, since it involves a prediction, based on knowledge of the system and the way it actually operates. Moreover, given the extent of the intertwined counseling role, attorney-client confidentiality is required.

As noted, above, in note 66, pending (in the spring of 2001) in the Ethics 2000 process, and formally proposed by the Ethics 2000 Commission, is a Proposed Model Rule 6.5 which would ease the rules governing imputed conflicts of interest and would relax requirements for conflict checking for those providing brief service or advice (unbundled representation). However even these limited relaxations would only apply to those providing such assistance in the context of a nonprofit or court based program.

⁸² For the reasons articulated in the above footnote, there might be serious questions about whether such volunteers would be engaging in the unauthorized practice of law. Such concerns would be lessened if such volunteers were under the formal supervision of a legal services program.

⁸³ For example, the volunteers would merely help people use the software, and so would not be engaged in the practice of law.

Notice of New Issues

As discussed above, providing notice to plaintiffs of the respondent's answer and claims is far easier than meeting the more formal notice requirements for the commencement of an action. However, sufficient notice for adequate hearing preparation by the original self-help plaintiff is essential.

X. Hearing Preparation Process

Most self help litigants probably do very little hearing preparation. Their focus is probably mainly or exclusively on the formal papers which the court tells them they must complete. Most self-help litigants probably see going to court as an opportunity to "tell their story." This is, of course, in one sense correct, but it fails to engage the complexities of creating a coherent message, crafting a prima facie case, or dealing with issues of credibility -- issues that lurk no matter how self-help friendly a court is.

While it is very much the job of the judge, and indeed the whole court, to create an environment in which people can "tell their story" with as little interference, and with as few limitations or constraints as possible, nonetheless litigants are entitled to the best of help in learning how to do it. The form that preparation will best take will depend on the way that the court itself structures the hearing. Generally, self-help programs report that in court presence prior to the litigant's own hearing is a critical part of the process.

There are Many Components to Effective Hearing Preparation With Which the Court Must Assist

Telling a story. In this sense the best prepared self-litigant is like the best prepared lawyer -- ready to tell a story. But the lawyer knows how to tell that story to an neutral person, constrained by law and process. In contrast, the litigant's experience is of telling the story to sympathetic friends and family, many of whom know much of it already. Good hearing preparation techniques must help the litigant prepare the story, but must also inform, sensitize and guide the litigant to think in terms of the same environment within which the judge -- no matter how helpful -- must operate.

Viewing through other eyes. In some ways the greatest skill in any adversary system preparation is disciplining oneself to see a case or a story through the eyes of others. Some ways to do this, with varying technologies:

- Finding ways to get litigants to see the weakest parts of their case;
- Asking how others would look at particular parts of the story;
- Asking what piece of the story the litigant finds it most difficult to tell (or is most hesitant to tell), and;
- Asking which pieces of the story family and friends regard most skeptically.

Witnesses. Telling your story yourself is one thing. Telling the story through others is another. People need help in helping their witnesses tell their story, and help in fitting that into the broader story the litigant is telling.⁸⁴

Documentary evidence. Using the paper trail to tell your story might seem simple. After all it is prepared in advance, and is subject to far less uncertainty than the spoken word from uncertain and unpredictable witnesses. But because paper evidence is rarely self-authenticating, it presents special challenges to the self-represented litigant. Moreover, understanding how to fit the paper into a broader story can be difficult.

Credibility. Particularly difficult is preparing to present issues of credibility. Lawyers are experts at "appropriate" challenges to, and bolstering of, credibility. For most self-help litigants, attacks on an opponent's credibility will seem shrill, and often do more harm to the party challenging credibility. Conversely, attempts to bolster credibility will seem completely self-serving, and worthy of little consideration. That is one of the major reasons that people have lawyers, to do the "dirty work."⁸⁵

As a result, it is probable that most self-help litigants rely on what they believe is their own inherent credibility, and let the facts of their opponent's actions speak for themselves.⁸⁶

Litigants Need Help in Organizing Story, Facts, Witnesses and Documentary Evidence

In order to be open to self-help litigants, courts need to develop a variety of techniques for helping the litigant think through the presentation and rebuttal process. These techniques might include helping mechanisms – such as volunteers, coaches, support groups – and also concrete tools – such as on or off line analytic templates that make suggestions and show the consequences of choices.

Analytic Templates for Each Case/Situation (on or offline) Offer One Preparation Solution

The vast majority of self-help situations fall into standard situations such as defending an eviction proceeding brought because the tenant is allegedly behind in the

⁸⁴ In administrative hearings, the hearing officer usually basically invites the witness to "tell what you know", or some other equivalent generality. The success and fairness of this depends heavily on the articulateness of the witness, and their instinct for practical rules of relevance.

⁸⁵ How many lawyers have told their clients not to attack the other side. "Leave that to me," they say in effect.

⁸⁶ It may also be that judges facing self-help clients may be particularly prone to cut off lines of exploration that might lead to impeaching evidence, out of fear that such matters could spin out of control in the courtroom. It is hard to know if such fears are actually reasonable. They are certainly understandable.

rent, repair shop failure to fix car properly, security deposit not returned on apartment, and request for child support modification after remarriage or new job, etc.

It would not be hard for a court to develop a series of analytic and evidentiary templates that walk a litigant through all the various kinds of claims, the elements of each claim or counterclaim, all the kinds of evidence in support, and how best to present that evidence.

This template could take various physical forms. It could be an on-line kiosk or PC program that would branch through options. It could be a huge wall chart that people could talk each other through. It could be a booklet that branched page to relevant page. It could even be a carpet in the form of a chart that people could roll out onto the floor of a meeting room in order to “walk through” the analysis of a case.

To give an actual example, an eviction defense template would first detail all the possible defenses and counterclaims (these would presumably have been explored first in an answer template in any event),⁸⁷ and then for each of the defenses, tell the person the elements of the defense and some of the ways that these facts could be shown.

Thus, for the defense of building code violations, the template would explain, depending on governing law, the need for the violation to be of the actual code, help identify the possible violations, and what facts need to be proved to establish the case (date of violation, notice to landlord, except where implied as a matter of law, impact of the value of the tenancy, again except where implied as a matter of law, and the like.)

The system would suggest a template – sort of an outline – of the kind of evidence from the party him or herself. This would include the main kinds of points that are important, how to illustrate them with facts, and how they tie together into a story.

For each of these, it would make specific suggestions of photographs, witnesses, building inspection reports, letters of complaint, etc. and go into detail about how to prepare or gather those pieces of evidence.

Witness Preparation and Presentation Templates

Similarly, the templates would help in the process of preparing to present witnesses or documentary evidence in court.

The templates would, for each of these frequently occurring types of case, and for each type of evidence, include information on how to prepare witnesses. Examples of some of the possible witness preparation tools, which again could exist in a variety of media, include:

⁸⁷ Of course in an electronic environment, the defenses would all have been downloadable from that earlier answer generator.

- Forms to give potential witnesses information about how to tell their story, and what is relevant. Such forms could have blank spaces for customization by the litigant;
- Model question and answer formats to obtain types of information, and;
- Model stories of how to bring certain evidence out.

Similarly, tools for documentary evidence (discussed more generally and expansively below⁸⁸) might include for each kind of evidence:

- A check sheet of what needs to be shown in order to obtain admission of the evidence;
- A script to be followed in court, and;
- Written document requesting waiver of formal requirements from the opposing party.

These all Lead Together to Integrated Case Assembled Templates

The most sophisticated of such templates would integrate all the above to create a comprehensive packet designed to help the party understand and prepare their case. The integrated packet – produced at the end of an on-line or human interview process -- would include the following:

- A summary of the case that needs to be presented;
- An outline of witnesses and what each will say;
- A handout to give each witness;
- A listing of documentary evidence, and what it is to be used for;
- A sheet explaining the foundations needed for each piece of documentary evidence, and;
- A listing of likely rebuttals and attacks and how to answer them.

Self Help Litigants Need Help in Challenging and Bolstering Credibility

Bolstering and challenging credibility is very difficult for the untrained. Some ways that courts might help self-help litigants prepare to do so are:

⁸⁸ See below at p. 52.

- Credibility analysis tools, listing ways that people in particular situations (landlord, car seller, tenant) might be biased or unreliable;
- Credibility analysis templates; diagnostic tools to find out whether such bias or unreliability existed;
- Credibility vulnerability analysis tools and templates, designed to help a party perform the same analysis and preparation on themselves and their own witnesses, and;
- Credibility bolstering tools; similar templates designed to help people find the ways to show that such reasons for questioning credibility are themselves not to be relied upon.

Such tools could be on or off line, and could be used by individuals or by self-help staff.

There may be danger in such advocacy tools, in that they may intensify conflict in the courtroom. Since many litigants may not know how to use the tools with a sense of appropriate balance, the self-help courtroom could deteriorate into the “Judge Judy” environment.⁸⁹

Such a risk can be lessened by placing these suggestions into an overall context, by warning of the risk of backlash, emphasizing the need to be sure of one’s ground before advancing impeachment, and perhaps above all finding ways to show people strong models of courtroom behavior.⁹⁰

The Court Should Generate Models of Courtroom Presentation Distributed by Video, Computer, Text, and the Like.

As a practical matter, the best way for people to learn about how to present a case is to watch good models of such hearings – preferably in cases as close as possible to the one at issue.

In addition to having videos of hearings available for viewing in a special training room, and following some of the suggestions laid out earlier in this paper for building the

⁸⁹ The impact of “Jessie Ventura meets Perry Mason” on the public image of courts can not be underestimated. California Family Court facilitators have reported that children in that state are fearful of going to court because they fear that the judge will treat them the way that Judge Judy treats people in her “courtroom.” It is perhaps too much to hope that Ms. Scheindlin will reconsider her professional approach, www.judgejudy.com (“Do you see stupid written on my forehead”). The legal profession and those concerned with the reputation of courts, however, must find a way to reverse this threat to public trust and confidence.

⁹⁰ Some of the ways of doing this include making courtrooms as educational and public as possible, p. 16, above, and the use of streaming video and CD models of courtroom demeanor.

courtroom and courthouse to maximize visibility, it would be possible to create an interactive model hearing generator.

Such a hearing generator would either take input from a previously completed template, or would walk the user through questions to define the case, and would then assemble a video or CD showing examples most relevant to the particular litigants situation. If, for example, in an eviction case, there was to be a challenge to the sufficiency of service, the model would include a sufficiency of service segment. Note that if such a presentation would built on a CD, a CD could be “burned” and given to the litigant for use at home, and/or with the potential witnesses.

Litigants Need Rehearsal and Evaluation Environments

Information and examples are not enough. Litigants need ways to try out and get reactions to their presentations, to find out how judges are likely to react to those presentations. Some suggestions:

- Availability of self-videoing kiosks in which the litigant can video tape themselves, and their witnesses and then see the way a story appears;
- Community organizations setting up a program in which individuals can present to a group of those in a similar situation, and;
- Pairing up “new” court users with a more experienced one to obtain feedback.

The Possibility of Group Preparation

It is relatively easy to image a group of similarly situated people sitting in a group discussing and comparing their cases, and trying out their presentations. Indeed, something like this probably happens quite often during group counseling sessions at domestic violence shelters. However the institutionalization of such a technique raises a number of difficult questions, the resolution of which would need to be achieved before such groups could be used.

Most important is the fact that such conversations would not be privileged either as a matter of law, or in practice. It might be that the giving of a draft court presentation to a group would rarely in practice lead to testimony from the participants, particularly if people were warned in advance to limit themselves in the group presentation to what they intended to say later in public in the courtroom. On the other hand, the decision later not to say something in court, after discussing it in public in the preparation group, might open a participant to impeachment.

Moreover the challenge to the facilitator of the group would be to create and maintain an environment that was both supportive and challenging, both like a courtroom and like a support group.

Assigning a Coach or Partner Might Be More Effective

In the early days of welfare rights organizing, people going through the welfare application and hearing process would be given a “coach” -- someone who had been through the process in the past and could both warn the “newbie” of what would happen, and help him or her think through the details.

A similar approach, probably facilitated by community organizations, might well work in this situation. As a general matter, the conversation would not be privileged. There is always the possibility that such volunteers might be trained and supervised by a legal services program, however, and that the conversations would thereby fall under the privilege.

Training and the conversations themselves could narrowly focus on presentation or could also go into substance and process.

XI. Before the Hearing Step: Process Management and Expedition Techniques

A major concern for courts that try to help self-help litigants is the fear that such openness will increase the volume of cases and the time that they take and so clog the court’s calendars. This fear comes from the belief that self help clients are more likely to request continuances, less likely to be able to manage all related matters in one hearing, and more likely to come back for additional matters, or resolution of uncertainties.⁹¹ Regardless of the general validity of these concerns, self-help courts will have to develop appropriately tailored mechanisms for case management that meet the special needs of litigants without lawyers and protect against the possibilities for confusion and delay.

In summary, self-help case management is at the theoretical level the same as any case management, in that it tries to focus appropriate resources on appropriate cases.⁹² However, it must be conducted with special care not to impose burdensome requirements on those who, because they lack lawyers, have particular difficulty in meeting any such requirements. Similarly it must be implemented with an understanding of the special preparation and process needs of those without lawyers.

⁹¹ It is not clear how valid these concerns turn out to be in practice.

⁹² David Steelman with John A. Goerdt and James E. McMillan, *Case Flow Management: the Heart of Court Management in the New Millenium Chapter I, Basic Caseflow and Management Methods* (National Center for State Courts, 2000); Mauren Solomon and Douglas Somerlot, *Caseflow Management in the Trial Court, Chapter III, Caseflow Management, Fundamental Elements*. (American Bar Association, 1999)

The Self-Help Case Management Process Should Include a Form of Pre-Hearing Screening Tailored to the Self-Help Situation

At a minimum, before any case goes to hearing, it should be screened to see that it is really “hearing ready”. This screening should occur as early as possible after the time that the case should be “hearing ready”, and by someone with the authority to take the appropriate corrective action if the case is not “hearing ready.” The process could occur with or without the litigants present, although the potential to fix things quickly is much greater if they are present.

Among the components of the screening:

- Are all required pleadings completed?
- Has all discovery been completed?
- Do the parties understand the case and what they have to do at the hearing?
- Do the parties have the evidence they need to tell their story?
- Are the parties ready actually to tell that story?
- Has the fee waiver or fee payment process been completed?
- Are there any other things that must be done before the hearing?

Process Management Might Include a Reasonableness Check, and a Process to Answer any Preliminary Determination of a Lack of Claim

Process management might well include some filter to identify those cases in which the plaintiff has no chance whatsoever.⁹³ (Doing so in a way that will not impinge on the parties rights would be difficult.) Such a reasonableness check would be conducted after all submissions, and by court attorneys. It might be conducted by the attorney writing a decision memo, then giving the party an opportunity to rebut the memo. Such decision memos would need to be written with great care, designed to help focus the litigant on what was missing from the case. Any court that implemented such a system would need to develop a system of human helpers who could make sure that the litigant understood what was needed, and got assistance in putting it together.

Such a check would allow the court to focus both its assistance and its decision-making resources on those who would be helped by those resources.

⁹³ This writer does not suggest that defendants should be similarly screened. When a person seeks to involve the power of the government against them, then the person against whom that power is to be involved should always have a true opportunity literally to “be heard.”

Triage Model

A different, not necessarily inconsistent case management model would be triage – related to differentiated case management. In this technique, all self-help cases would be screened early in the process. Those identified as more complex, and more likely to cause delay and/or injustice, would be put onto a track with more intensive supervision and more self-help support resources.

Among the criteria for such treatment: number of claims and counterclaims, number of parties, type of case, prior history of litigation, quality of pleadings, amount at stake, history of relationship between the parties, likelihood of ongoing relationship and conflict between the parties.

Among the resources that could be dedicated: staff attorney review, self-help staff priority attention, pre-hearing conference and review.

Options for Expediting Cases Should Be Considered

Consideration should also be given to developing standards for expediting certain of the self-help cases. These fall into two main classes, those in which the case is sufficiently simple that there is every reason for acceleration, and those in which the intensity of feelings and risk to the parties justify acceleration.

“Simple” cases are identifiable by case type, by lack of opposition, and by lack of prior history. Such cases should be moved whenever possible into the unopposed category by providing every opportunity for response, and then handled without court appearance of any kind when there is no opposition.

In the cases in which there is opposition, but the issues are simple, the parties should be given options of phone call hearing, written submissions, voluntary mediation and other court non-intensive methodologies. These services should be available within the courthouse, without confusing and delaying referrals to other offices.

“Urgent” cases are those in which matters will escalate if attention is not promptly paid. Examples would be certain divorces and all domestic violence cases.⁹⁴ Urgent cases could be identified by case type, by history of the relationship between the parties – including in particular cross petitions, and other evidence of reliance on the legal system to define the relationship, as well as by an individualized review of the pleadings.

A computer model integrated with the case management system could be developed to flag cases appropriate for expedited handling.

⁹⁴ There is evidence both that the period during which a victim seeks a divorce is a period of high risk. See note 40 above. It may be that some abusers cease their abuse behavior once a court has “clarified” for the defendant that he no longer has any what the defendant has erroneously viewed as “rights” “over” the victim.

Magistrates or Commissioners Could Handle Case Management

One of the more interesting proposed innovations in self-help litigation is for the creation of magistrates or commissioners with quasi-judicial powers to manage a pre-trial process specially designed for those without lawyers.⁹⁵

While ideas vary, these magistrates/commissioners would be able to manage cases in a self-help court much more tightly. They could:

- Meet with all the parties to engage in the decision-readiness review discussed below;
- Check – in the parties presence – that all documentation, papers, discovery was complete before the formal hearing;
- Give warnings to the parties of the strength or weakness of the case;
- Make referrals to the various court or volunteer-based hearing preparation programs;
- Make referrals to alternative dispute resolution programs;
- For documentary evidence, make sure that the foundation evidence is available;
- Identify any evidentiary areas that are going to be particularly complicated, and provide resources so that the litigant gets of advice and help;
- Go through the cases of both sides, making sure that uncertainties about presentation, foundation, or prima facie case are fully understood and resolved by all sides;
- Manage the unbundled aspect of the litigation by encouraging, and;
- Helping the parties to obtain counsel for limited purposes. As discussed below, this limited counsel usage could include pro bono or legal services assistance.

While these commissioners could play many roles, the key to their importance is that they have much of the force of judicial decision makers without carrying with that the inhibitions and constraints that come from the formal judicial role. In particular, since the commissioner is not going to make the ultimate decision, there is little danger that

⁹⁵ One of the more notable, and controversial, proposals, has been made in Massachusetts by the Family and Probate Department of the Trial Court. The proposed magistrates would have substantial power, including the management of unbundled assistance for those without lawyers. http://www.massbar.org/phpslash/public_html/article.php3?sid=20000322104159.

helping one or both sides with the preparation for presentation of evidence will be perceived as a violation of the neutrality of the court.⁹⁶

After the Process, a Final Decision Readiness Review is Needed

Regardless of whether it is done by commissioners, by the clerk, by volunteer attorneys, by staff attorneys, or an on-line checklist administered by a volunteer non-attorney, decision readiness review is critical to a smooth running self-help court.

However, the extent of intervention will depend on the authority, skill and formal role of the person assigned to this task.

At a minimum the review must include the readiness of the papers, compliance with service requirements, completion of discovery, and payment of fees or needed waivers.

The Advantages of Connection to Self-Help Advisors for Case Management Should Be Explored

Any staff who are meant to help people – self-help staff, clerks, building help staff – should be fully integrated with the case management system. They should know how to find out where each case is, what it needs to move forward, and what will happen next. The system should also link into the help information systems described above, so that the helping staff person can quickly find and give the court user the information they need.

More fundamentally, each step of managed case handling should integrate the helping staff into the process of moving a case from one step to the next, with frequent, if not automatic referral to the self help staff after each hearing or step, so that the litigant can be as fully informed as possible, and can be a partner with the court in moving the case forward.

The Court's Case Management Structure Should Include a System of Court Facilitated Unbundled Assistance

The provision of so called “unbundled” legal assistance is a major innovation in providing access to justice for those who can not afford or find civil legal assistance, as well as those who want to keep their legal costs down, or want more control over their own legal processes.⁹⁷ The idea that litigants can buy or obtain assistance in those parts of the process that they can not handle on their own offers both a help and a challenge to those engaged in court system redesign. The help comes from the fact that such

⁹⁶ Although the author does not believe that such assistance, even if given by judges, would necessarily violate neutrality norms, it might be helpful and appropriate to urge modifications of governing judicial conduct codes to make this clear as a matter of law.

⁹⁷ The concept is discussed at both the practical and theoretical levels in Mosten, *supra*, note 12.

unbundled help can always be there to fill the last gap, do the one thing that the person without a lawyer can not do. In particular, attorneys can provide confidential advice and evaluation to clients, filling in one gap that court self-help staffs can not help with.⁹⁸ The challenge comes from the possibility that the availability of this assistance might increase even further the volume of people who come to court without lawyers.⁹⁹

The process management system of the court should provide for ongoing screening for the appropriateness of unbundled assistance, and of course, make referrals wherever appropriate. Such screening should include evaluation of case type, case history, types of evidence needed, history of the relationship between the parties, capacity of the litigant, and personality of the opponent.

These screening systems should be both electronic and personal. All staff who deal with litigants should know how to look for the signals that indicate the need for unbundled help, and the computer system should, at each step, make a statistical analysis of the areas most likely to need unbundled help.

It might be possible to link the court's computer system with that of the legal services program, so that the two programs can continually monitor the need for services in the self-help population, and the legal services program can take the initiative to get those services to the appropriate clients. Such a process would require a sophisticated algorithm.¹⁰⁰

XII. Hearing and Decision Making Process

The redesign of the hearing and decision process is at the core of the whole restructuring of the court. Everything else, including information, submission support, analysis, hearing preparation, enforcement, ends up being structured to support that central hearing and decision process. Therefore those engaged in the process of thinking through such a different court should start with this core process, and then move back to the other supportive processes.

⁹⁸ See note 17, above.

⁹⁹ Unbundling also offers substantial opportunities for cooperation with the private bar. It allows advocates for court efforts to improve access to those who are not using a full time lawyer to demonstrate to the bar that such programs could increase rather than decrease business for lawyers, Mosten, *supra*, note 12.

¹⁰⁰ The process of building such a self-improving algorithm would be fascinating and extremely helpful.

The Core Idea is That the Judge Should Outline the Issues and the Possible Grounds of Decision and Then Walk Through Those Steps One by One, Rather Than Focus the Hearing on the Case as a Whole.

Currently the court hearing structure assumes the presence of well prepared counsel who understand not only the whole case, but the often complex relationship of the parts of the case, and of the witnesses and the evidence to each of those parts of the case. It is assumed, moreover, that the judge as well as counsel share the same core understandings about these relationships.¹⁰¹ The jury (rarely there in any event) is not assumed to share this understanding, but is expected to be making only factual determinations, and to follow the judge's instructions as to the legal implications of those facts. Within this environment, each side goes through their whole "side" or "story," relevant to all issues, interrupted only by cross-examination or major motions.

The problem for all self-represented litigants is massive confusion in the courtroom. If the judge swears in the litigant and then invites him or her to "tell your story," the litigant runs the risk of not knowing what is central, what is relevant, what gets in the way, and what is going to backfire. If, more traditionally, the judge expects the litigant, notwithstanding the absence of counsel, to follow the traditional presentation style,¹⁰² it will be even harder for the litigant to "get it right" and include all the relevant information in a coherent and comprehensible whole. Particularly where the difference between opening and closing statements on the one hand, and the evidence on the other, is not well understood by the un-represented litigant, the opportunity for confusion and irritation on all sides is even greater.

One way for the judge to take control of the process and begin the case is by outlining the decision making steps that he or she anticipates going through. These steps would include the elements of the prima facie case and defenses.

For example, in an eviction case, the judge might, based on the submissions, state that first he or she had to decide if the tenant received proper notice, and that then he or she had to decide if money was owed. Then, that, only if it was owed, he or she must decide if there was any reason that the eviction should not be granted, including in the explanation a list of the possible reasons, such as code violations resulting in an offset to unpaid rent. The judge would explain that he or she should would announce a *tentative* decision after each step and would plan to outline the consequences for the rest of the proceeding for any likely decision at each step. The judge would conclude this part of the procedure by allowing the parties to add to the issues before the court (subject to a broadly defined notice requirement).

¹⁰¹ If, there is no agreement, because of disagreements as to the law or the procedure, motions *in limine* are used to clarify the situations *before* the taking of evidence before the jury.

¹⁰² It may indeed be that this formal procedure is mandated by court rule, and unless waived by the parties, therefore required to be followed.

At that point the judge would invite BOTH sides to address the initial issue only. This addressing would include witnesses, paper evidence (discussed below) and any clarifications sought by the judge, and an opportunity to the parties to add any comments on that issue alone. The judge would then make the formal decision on that issue alone, explain the consequences of that decision for the rest of the proceeding, and then advance to the next step, following the same general procedure for each step. In a sense this is extending the formal procedure of motion, hearing, trial, and post trial. But it is amending this by, on the one hand, combining as much as possible into one event, and on the other, by breaking down the major part of the litigation into small and easy-to-understand steps.

Before the end of the proceeding, the judge would ask the litigants if any issue had been omitted. At the end the, judge would issue a final decision, explaining again the steps that had been gone through to reach that decision. A judge would be free at this final point to reverse any initial decision, and might then have to go through steps previously thought not necessary.

The advantages of this process should be that litigants should be able to better present focused evidence and arguments on the components of the case, that the case itself should be smoother and cleaner, that the litigants should ultimately understand the reasons for the decision, and that they and others in the courtroom would then be better prepared for any future litigation. Above all, one would hope that the result would be more legitimate.

The Court Should Develop Standardized Computerized Templates to Manage This Decision Process in Frequently-Occurring Types of Cases

If courts were to develop standardized decision templates for frequently-occurring cases, judges would find it far easier to engage in the kinds of processes described above.¹⁰³ The trick would be to develop a computer program that was sufficiently general to include many possibilities. Then, before the case came up, the judge could go through an on-line interface and decide which branches were relevant and which not, and could name branches, and add detail where necessary. This customized template (with the right names of the parties included in the right places by the software) could then be handed out and given to the litigants. If the template changed during the course of the litigation, then a new template could be prepared and printed.

The Court Should Deploy Visual Aids as to Each Area of the Case.

In a more advanced version of the same concept, the template could be projected on the wall of the courtroom. As individual decisions were made, the template would change (becoming simpler as tentative decisions were shown and possibilities were then excluded based on those tentative decisions). The software would then refocus at each

¹⁰³ For a discussion of selection and training of judges in the self-help context, see below at page 69 et seq.

point on the matter next in issue, continuing to show the possible implications of each possible choice.

Such a visual presentation would help keep the parties focused on the matter in issue and away from irrelevances.

A Disadvantage of such a System is that it Makes it Harder for the Fact Finder to Make an Overall Assessment of Credibility

The major argument for deciding the case as a whole, rather than splitting it up into factual as well as legal steps, is that in the real world, evidence heard on one fact can influence the decision maker's view of the credibility of a witness or party, and that view can then influence the fact finder's view of how to decide other factual disputes. A party or witness may seem highly credible until confronted by a lie. At that point earlier testimony is cast into the severest of doubt.

The above model does allow a judge to change his or her mind after hearing such evidence. But as a practical matter, it is much harder to remain open to such a change when one has already made a public judgment, no matter how tentative.

One way to solve the problem might be not to use this methodology to handle individual cases or types of cases that hinge clearly on credibility.

An alternative approach would be for the judge to allow each side to summarize their account, then make a preliminary judgment about credibility, before going through the more careful step-by-step process.

Courts Should Allow a Coach/Listener/Helper in the Courtroom

For most litigants, actually having to stand up and talk to the judge, while knowing just how important the outcome is going to be to their lives, is probably the hardest part of the process. Courts that seek to be open to such litigants must make possible whatever support they feel they can for those in that situation.

In particular, they should permit the "coach" discussed above,¹⁰⁴ or the member of the preparation support group,¹⁰⁵ or a family member or friend to sit at what, in a traditional court, would be the counsel table, and listen to the proceedings and make quiet suggestions to the litigant. At a minimum, such a person is likely to help calm any tensions that might burst out.¹⁰⁶

¹⁰⁴ See above at page 42.

¹⁰⁵ See above at page 41.

¹⁰⁶ Such a role is surely not the unauthorized practice of law, since it is providing support, not taking over the presentation of the case. However, the court might require a training program for people who are to play such a role.

Trained and Supervised Volunteer Lay Advocates Could Also Advance Support and Advocacy

Suggestions have been made that trained and supervised volunteer lay advocates could play a major role in advancing the presentation of self-help cases.¹⁰⁷ Just as law students are authorized, under supervision, in many jurisdictions to appear in indigent cases,¹⁰⁸ so appropriately trained college students, and others, could play a limited but helpful focused role in getting self-help clients stories out.

These lay advocates would have to be trained specifically in the substantive areas in which they would help. They would need forms of attorney supervision, probably through collaboration with legal services programs, and the programs would have to be carefully designed not to run afoul of prohibitions on the unauthorized practice of law.¹⁰⁹

Immediate Announcement of Decision Is Usually Helpful

As a general rule, regardless of the process that the judge follows in the courtroom, it would make sense to issue a decision, and an explained decision, immediately.

While many judges feel that passions calm with time, the fact is that a decision issued in the courtroom has a weight and a finality that a later mail decision does not. More importantly, however, an immediately issued decision can be questioned and clarified, and ambiguities and uncertainties addressed, making it less likely that there will be return trips to court.

In those cases in which the judge fears courtroom outbursts or hostilities, the parties could be told to wait in different areas, and then quickly be given a judgment paper by the clerks.

¹⁰⁷ Ernest Winsor, *Lay Advocacy One Answer for Unrepresented Tenants*, 9 Legal Services Reporter No 3, 15 (Massachusetts Legal Services Corporation; 1999). This idea also is not new. Compare, *The Persecution and Intimidation of the Low Income Litigant*, above, note 28 at page 1682 (“an informed layman . . . could go a long way to making the hearing a fair one.”)

¹⁰⁸ E.g., Mass. Supreme Judicial Court Rule 3.11.3.

¹⁰⁹ These rules might produce less of a barrier than might at first be thought. In Massachusetts, for example, the prohibitions do not seem to run to programs for the indigent. Winsor, *supra*, at note 107. In the State of Washington, the Supreme Court is moving towards a definition of unauthorized practice in which public interest in access to justice is balanced against the public interest in control over the predictability of the service, *Perkins v. CTX Mortgage Company*, ___ Wash. ___, ___ (1999) discussed at note 22, *above*.

There Are Advantages to an Immediate Written Explanation, Possibly Generated From a Computerized Template

When possible, a written decision is similarly highly desirable. In template-driven cases, it might be possible to have a computer splice together paragraphs quickly, and then have the judge type in a few paragraphs of explanation, together producing a printed judgment. This is similarly likely to produce finality.

The decision should make clear the relationship between fact and law, thereby both better explaining the decision and educating the parties for the future.

The Same Principles Apply to a Jury Case, but With Greater Force

For a self-help litigant to go before a jury without counsel obviously represents an even greater risk. Such a litigant can not be sure how the jurors will react to any confusion or mistakes.

At a minimum a self-help litigant is entitled to appropriate, and if necessary repeated, jury instructions on the need for the jurors not hold the litigants self-help status against him or her, and on any specific confusion that may occur.

Judges should, of course, be particularly careful when litigants have been forced into a jury trial by an opposing side that does have counsel.

XIII. Evidence and Documents

What many describe as the “technicalities” of the law of evidence present a major barrier to making court processes open to all. Not only do they intimidate the parties, but they create significant barriers to the presentation of evidence to the fact finder. Once there is confusion, judges feel torn about whether and how to intervene, and they fear compromising their neutrality.¹¹⁰

As a general matter, the proponents of making courts more open to litigants without lawyers advocate looser evidentiary rules and the relaxation or elimination of some of the more incomprehensible and difficult to apply barriers to the introduction of evidence. As a practical matter, this implies a greater reliance on the ability of judges to decide how to give only appropriate weight to evidence that comes in, without that evidence being subject to technical objection, and being, at least arguably of weaker force.

¹¹⁰ Indeed, it seems to this writer that judges, in terms of perceived threats to their neutrality in the self-help context, are more concerned with this particular issue than any other. *Compare, generally, Meeting the Challenge, above*, at pages 52-53 (discussion of judicial attitudes to the perceived threat to neutrality)

Of course, these solutions vary widely depending on whether they require a change in underlying law. Most of the suggestions below could be effectuated within existing law, or by court rule. Others might require statutory modifications.

The Foundation of Evidence Should be Assumed Unless Shown to be Absent

In one sense when there are self-help litigants on both sides, evidentiary matters are simpler. It may well be that neither side knows enough of the governing technicalities to mount an effective challenge to evidence, unless there is some real common sense reason to challenge the accuracy of the evidence. In theory then, in the absence of objection, in most jurisdictions, most evidence comes in and may be given what weight the fact finder finds appropriate.¹¹¹ To the extent that a jurisdiction requires a foundation for certain evidence even when there is no challenge, serious thought should be given to changing the presumption, by court rule, legislation, or decision.

When there is an opposing attorney, or a very well prepared self-help litigant, however, there may well be formal objection, and the judge may then feel obliged to exclude evidence which is relevant and which would indeed be admitted if the proponent of the evidence knew what to do.

One way to make such exclusions less likely would be to require those opposing the admission of evidence to be far more explicit in stating the reasons that the evidence should be excluded.

The rule should be that unless the objection was specific enough for the judge to understand why the question might lead to improper evidence, and specific enough for the proponent of the evidence to be able to understand the problem enough to be able to fix it, the failure to be explicit would doom the objection and the evidence would go in.

However the judge in turn should be explicit in overruling the objection: “your objection fails because you failed to explain to [the proponent of the evidence] why there is a defect in the way it was presented and to give him enough information so that he has an opportunity to correct the omission.” This would, of course, tend to reverse the rule in practical if not legal effect in most jurisdictions.¹¹²

Judges Should Always Explain the Reasons for Rulings on Evidence

Similarly, the rule governing the level of detail expected in a judge’s ruling on admissibility should be reversed. Currently there is no requirement of explanation at all.

¹¹¹ John W. Strong, *McCormick on Evidence* 200 (Fourth Ed., 1992)

¹¹² Interestingly, the rule governing an objection to what a *judge* does requires much greater specificity than the requirement of objection to what a proponent of evidence does. Strong, above, note 111, at page 205. Of course much of the tolerance given to summary objection may be to make it less likely that the jury will figure out what is going on.

Rather the ruling stands on appeal if justified by any reason, and therefore there is every incentive for the judge to be vague. A judge should be required to explain the reason for the ruling in sufficient detail for the litigant to be able to correct any correctable error in the submission of the evidence. This may require substantial explanation in the case of evidence for which a complex foundation must be laid.¹¹³

These two above rules are “self-help neutral,” that is to say that they need not require judges to treat self-help litigants any differently from those with lawyers, yet they would have a huge effect on the navigability of the process for those without lawyers.¹¹⁴

Parties Should be Allowed to Bring Weaknesses in the Weight of Evidence to the Fact Finder's Attention, without Necessarily Becoming Tangled in Technicalities

Much of the wasted energy and confusion in challenges to evidence could be saved if parties were allowed to point out the weaknesses in evidence without becoming bogged down in technical barriers. Thus, a document might well be given less weight if not properly authenticated, depending on the view of the fact finder.¹¹⁵

Under this approach, parties who challenged admissibility would be encouraged to emphasize such weaknesses, but to waive any attempt to exclude.

When Attorneys Attempt to Exclude Evidence on Foundation Grounds, They Could be Given the Option of Waiver or Delay

There is no doubt that well prepared attorneys versed in evidentiary technicalities can put major roadblocks up in the way of the self-help litigant.¹¹⁶

Such attorneys could be deterred by simply being given the choice of an adjournment for purposes of obtaining the foundation, or of waiving the objection.

¹¹³ If the rule on appellate reversal were itself reversed, it is likely that the harmless error rule, requiring an error complained of on appeal to have had an impact on the outcome before a reversal can be ordered, would prevent any significant increase in reversals.

¹¹⁴ The one place in which these rule changes would have a different legal effect would be on appeal. It might be that error in objection or explanation of ruling that would be harmless for a litigant with counsel might be found on appeal (if any) to be fatal to the un-represented litigant. Such an appellate determination might require the use of techniques which allow the appellate court to go beyond the trial record.

¹¹⁵ In the law of documentary evidence, we tend to assume that weight is a yes/no proposition. The paper comes in, and is given great weight, if it meets admissibility standards. If it fails to meet those standards, then it has no weight. But this is an exception to the general rule governing the weighing of evidence. Generally the weight of evidence is not considered in isolation. Its weight depends on the credibility of the proponent, and on its relationship to the totality of the evidence.

¹¹⁶ *Query* the point at which such behavior might rise to the level of an ethical violation.

Presumably an attorney who believed in good faith in the accuracy, relevance, and significance of the objection would tend to insist on pursuing it.

This approach would not work when the attorney objecting actually had an interest in obtaining the delay, such as in the case of an attorney representing a husband attempting to avoid child support. Some of the lack of the incentive could be corrected by providing interim relief.¹¹⁷ Additional incentives such as pre-judgment interest on awards could be created.

The Court Could Take Responsibility for Obtaining the Foundation for Challenged Evidence

Perhaps more fundamentally, when the foundation of evidence was challenged, the court could take responsibility for building the foundation by creating and sending out to the guardian of the original of documentary evidence the appropriate authenticating affidavit. Such affidavits returned directly to the court could be assumed valid in the absence of impeachment.

The Self Help Counselor Could Go Through an Evidentiary Checklist Pre-hearing

Such a checklist would identify any evidence that would raise likely challenges, and the self-help staff could help with templates and suggestions.

XIV. Forms and Processes of Relief

There is a strong case that the greatest barrier to justice that self-help litigants face is at the relief stage. The system assumes an attorney who can request relief that is both appropriately general and appropriately specific in the pleadings, who can, after the conclusion of the hearing submit for approval a order that reflects the judge's decision (interpreted generously in favor of the winning party), and who can then go through what is often a highly complex, and indeed expensive, enforcement system, the details of which vary greatly with the jurisdiction, the kind of case, the form of relief, and local practice and custom.¹¹⁸ Even with all this elaboration, the non-compliance rate is high,

¹¹⁷ See, below, at page 56.

¹¹⁸ There is little detailed research on this problem. In as yet unpublished research, the National Center for State Courts, pursuant to the project described above at note 24 on page 10. In this research, the Center found that in Boulder Colorado, of 66 *pro se* cases with judgments, in which the status of the judgment was known, 55 were unsatisfied. (However in small claims cases in Lake Forrest Illinois, a far higher percentage of judgments were satisfied). *Electronic Communication from National Center for State Courts*, (January 12, 2001)

The dysfunctional nature of this part of the system is also well illustrated by the low rates of compliance of those ordered to pay child support. ABA Journal, September 2000, page 54 ("only 39 percent of all custodial parents received the full amount of court-ordered support An almost equal proportion – 37 percent – received no support at all from noncustodial parents.")

and the cost of enforcement a significant portion of the overall cost of the case.¹¹⁹ Some of the reported problems that act as barriers to effective relief particularly for the self-represented are:

- Courts requiring the submission of proposed orders;
- Inadequacy of the standard relief routinely offered the winning party;
- Lack of timeliness in relief as compared to need;
- Courts leaving to the winning party the triggering of the process that leads to the formal entry of the decision;
- Courts leaving to the party the notification to the opposing party of the decision;
- Courts requiring highly technical forms for finalization of relief;
- Courts having highly specialized procedures for enforcement remedies such as attachment of assets and resources upon nonpayment of court order;
- The need to involve other players to obtain enforcement of these remedies;
- Complex timelines and procedures for these other remedies, and;
- Requirement of new actions to enforce these other remedies.

This section offers a number of suggestions for how relief should be structured to avoid these problems. The section which follows this one discusses the often-interrelated issues of how the relief itself can be better enforced.

Relief in a Self-Help System Should be as Immediate as Practicable

One thing a lawyer can do is intervene when things go wrong. He or she should know the levers necessary to intervene quickly when a situation escalates. It may be motion, a phone call, or an *ex parte* hearing. Such intervention is much harder for an un-represented party. Therefore, it is important that a court designed to meet the needs of the self-help litigants be particularly open to interim relief and particularly open to relief that preserves the status quo or protects the un-represented party.

To this end, the case opening and submitting systems should include questions that give litigants the opportunity to highlight areas in which interim relief is needed. Questions within these systems might include:

¹¹⁹ Indeed, it may be that many who make the choice not go to court make it not because of the difficulties of obtaining a judgment but because they believe, often with reason, in the near impossibility of cost-effective enforcement of the relief that they have in theory already obtained.

- Is the opposing party continuing to do anything that does you economic or physical damage?
- Is there anything that is happening that must be stopped because it will not be possible for the court to put it right later if you win?

At the end of every hearing, based on the evidence and the judge's tentative decision, the judge should similarly explore whether there is any need for interim relief.

Moreover, the systems should be designed to be alert to ways in which interim financial relief may be required in order to prevent the harm of delay. In appropriate types of cases, self-help courts should routinely consider and update interim financial relief.

The Court Must be Involved in the Crafting, Preparation and Issuance of Interim and Final Orders

The frequent failure of courts to engage in the crafting of the most appropriate and enforceable relief exacerbates the problems litigants experience in obtaining what they need and expect from a court. Such abdication is particularly inappropriate in the self-help context because technical omissions or violations, and lack of foresight about possible complications, occur particularly easily and are particularly harmful to prompt justice, in part since it is much harder to get them corrected.

One way might be for the winning party to meet with a self-help specialist, or even with a clerk, to craft the most appropriately detailed remedy.¹²⁰ In some situations, the remedy expert might meet with both parties, together or separately. In many courts the order is identical to the court's record entry, and the same software should be able to generate both.¹²¹

It should go without saying that the formal preparation, issuance, and service of the order should be the responsibility of the court, not the litigant.

Compliance is Enhanced If the Court Gives Options to the Person Against Whom the Relief Runs

As a general matter, compliance is likely to be much greater if the person against whom the order runs is given a choice between a number of ways that the goal that the court has accepted may be met. Such options could be given either by the judge or the enforcement expert.

¹²⁰ Once a court has rendered its decision, engagement of court staff to craft the detail of the decision is less threatening to the neutrality principle than such engagement prior to the decision.

¹²¹ Such software is being developed in Alameda County California.

Judgment and Relief Should be Clearly and Immediately Announced

It should be obvious that the oral judgment, like everything else that happens in the courtroom, should be clear and audible to all. It should be comprehensible and effectively communicated.

XIV. Enforcement of Decisions

The Court Should Play a Major Role in the Enforcement of the Decision

The current practice, which often leaves enforcement to the prevailing party, is simply unacceptable in the self-help context. The principle should be simple. *The entire process should be structured so that the winner should have to do nothing further in order to obtain relief.* Rather, the court should have in place systems that shift to the person against whom the order or relief runs all the burden of compliance and the risk of non-compliance.¹²²

The Court Should Require the Exchange of Enforcement Information

At a minimum, after the decision, the court or its staff should immediately require the losing party to provide to it and, if necessary to the winning party, the information necessary to obtain effective enforcement of the judgment. This might include bank account numbers, other assets, and employment information (for garnishment). When a plaintiff brings an action, this information could be required to be filed and held under seal in case the plaintiff ends up losing a counter claim.

Systems Must Be Designed to Gather the Same Information for Defaulting Parties

Courts must find ways to help the winner of a judgment even when the loser has failed to come to court. This might be done in the following ways:

- Create an office of self-help enforcement with a variety of resources for enforcement;
- Have a staff expert in tracking people and resources for enforcement;
- Have attachments and other processes usually required to be performed by non-court people, done by the court staff. Court staff could include those empowered to formally seize assets, perform required service, etc;
- Create linkages to wage garnishment systems, including state tax systems, and;

¹²²

Compare the less demanding standard of the Bureau of Justice Assistance, *Trial Court Performance Standards, Standard 3.5 Responsibility for Enforcement* (1997) ("The trial court takes appropriate responsibility for its orders.").

Set aside from the analysis in this section are the possibilities of interim or final appellate relief.

- Create linkages to state licensing systems.¹²³

Systems Should Be Established Under Which the Loser is Automatically Ordered to Return to Court to Report on Actual Compliance or Face Sanctions and Enforcement from the Court

When a party has been ordered to make a payment or perform a task, the burden of ensuring compliance should shift to the losing party. This should be done by requiring that party to return to court by date certain and prove that they have complied with the order. The absence of such proof should trigger automatic relief, without the winner being present. This relief should not require any motions or other actions by the winning party. Such automatic relief could include garnishment of wages, seizure of property, even issuance of a warrant.¹²⁴

The absolutely routine nature of such relief should minimize the burden on the courts, although setting up these systems will require investments in rule changes, systems of notice, and changes in staff structures and assignments relative to traditional courts. There would be no need for a calendar, since the reporting could be done by affidavit at the clerk's desk or on-line.¹²⁵

Courts Need Systems for the Issuance of Simple Orders to Law Enforcement and Other Agencies and for the Engagement of these Agencies in the Enforcement of the Court's Orders.

A major barrier to effective enforcement of underlying court orders is the reluctance of courts to issue orders to government agencies.¹²⁶ Such reluctance, particularly strong in the case of the police, is often supported by the judiciary.

But often it is precisely the agencies that enforce the law day-to-day on the street – police, child protection, schools, housing agencies, etc. – that are most in the position to influence the real world outcomes of contested cases.

Self-help friendly courts therefore need to find ways to engage these agencies in support of the orders of the courts. A number of ways include:

¹²³ Some enforcement tools might require statutory changes.

¹²⁴ Appropriate notice of this possibility would be needed in relevant pleadings.

¹²⁵ Remote reporting systems could also be used. In either event, perjury penalties should minimize false reporting of compliance. Additional automatic penalties for false reporting would further deter abuse of the system.

¹²⁶ Classically, government agencies vigorously oppose such orders, often taking the position that the agency is not properly before the court as a party, or that the discretion of the agency should not be limited in aid of its underlying mission. It is hard sometimes for an outsider to understand the intensity of these arguments, given government's supposed common interest in enforcement of a just outcome.

- Developing cooperative relationships with these agencies so that they understand the need to cooperate with and enforce orders;
- Electronic systems that allow these agencies to see the orders, and the underlying information in support of the orders;
- Management information systems so that managers in courts and in the agencies can collaboratively monitor the on-the-street enforcement of these orders;
- Blanket waivers of objection to jurisdiction and service in aid of such orders to the agencies, and;
- Permanent placement of agency staff in the court, in order to revive orders, report back on outcomes, and obtain additional information.

In the end, however, courts must use the network of government agencies to enforce their orders. Courts face a major management challenge in persuading the agencies that they have a vested interest in the outcomes rather than being opponents of the court.

Courts Should Build in Automatic Review of Enforcement Needs at the Self Help Center

In any event, entry of a judgment should be routinely followed by an enforcement needs review by self-help staff. Staff should assist the litigant in crafting the enforcement strategy, making sure that all steps that the court can take are being taken, and that the litigant understands everything that she or he needs to do, and when and how to do it.

Why Should Enforcement Be in Court? Create an Enforcement Agency

The argument for the court's role in enforcement is premised on the belief that leaving enforcement steps to the litigant is unfair and impractical. An alternative would be the creation of a separate enforcement agency, which would automatically take over the order, and all needed information. This agency would have powers, staff, and a budget. Its services would be free to winning litigants. It would develop expertise in enforcement and would be able to use the resources of police, sheriffs, and other governmental agencies.

In the long term, the agency would be required to report on enforcement success rates, and would make recommendations for changes in law and practice to remove barriers to enforcement.¹²⁷

Similarly, it would make sense for state courts to establish statewide offices focusing on enforcement problems, on the potential of the state to assist with local

¹²⁷ There is a precedent in the federal requirement of creation of child support enforcement agencies. 42 U.S.C §654, *et seq.*

innovation, on the need to remove barriers to effective enforcement, and on long term strategy.

Part Four: Meeting the Needs of Uncontested and “Mixed” Cases

Uncontested and “mixed” cases, those in which only one side has counsel, present particular opportunities and problems for self-help courts. In both cases, however, the touchstone is the same, to empower those who would otherwise be dis-empowered by their lack of counsel.

XV. Special Simple Procedures for Truly Uncontested Cases

In many areas of practice a significant percentage of the cases are uncontested. Analytically, however, these fall into two radically different groups. The first group are the truly uncontested – those in which the parties agree on the outcome and the court is required as a matter of law to formalize the outcome.¹²⁸ Then there are those very different cases in which there is no agreement, but one party – almost always the respondent – does not participate in the proceedings because of inadequate resources, distrust of the process, fear of participation, or even ignorance of the fact of the procedure itself.

In the first group of cases, the question is whether such cases need to be in court at all, and if so, what procedures are most appropriate to satisfy the purposes for which the particular class of cases are required to be formally decided in court.

In the second group, the question is very different: what should the court be doing to maximize participation by those otherwise excluded from the system. More particularly, what should the court be doing to make sure that people do not abandon their rights before the litigation even starts, and what should courts do during the litigation, consistent with the rights of plaintiffs, to minimize the chance that respondents’ rights are extinguished too early. This second group is dealt with in a different section.¹²⁹

Why in Court? – We Should Think About Categories of Cases

Some cases are required to be handled in court because we believe that courts are the best place to guarantee the public visibility that protects against abuse, and there is no underlying adversarial need. In such cases we should first consider whether it is

¹²⁸ This group is divided into those in which there is in fact only one party, and the use of the court is required by law more as a symbol of visibility rather than as a guide to how a conflict is resolved, and those in which the court’s involvement is to ratify an agreement between the parties, an agreement that reflects the complexity of governing law. This first group includes adoptions and (most) guardianships. The second group includes most divorces.

¹²⁹ See below at page 66, *et seq.*

appropriate to move the cases to an administrative procedure,¹³⁰ and if that is impossible, create court-based quasi-administrative procedures that meet the formal requirements of court based due process, but with minimum burden on the one seeking an order.¹³¹

Screening – We Should Ask Why This Individual Case Is In Court

Even for those classes of cases in which the case type is in court because there is the genuine possibility of conflict or need for judicial review, we should be identifying and placing on an alternate track those individual cases in which there is no actual conflict. As discussed above, the absence of the appearance of conflict appearing in the papers is not the same as the absence of actual conflict.

The screening process should therefore only separate out those in which the papers themselves affirmatively confirm the absence of conflict. All our submission processes should be designed to encourage the parties to identify those cases, and should reward them for doing so by expedited processing.

For example, whenever possible, papers and forms designed for joint submission by the parties should include provision for consent to the judgment, and for waiver of procedural requirements. Procedures should be established for random verification of the waiver, with heavy penalties for fraud.

Service Requirements Should Provide No Barrier

The requirement of formal service for commencement of an action is often regarded as a barrier to such expedited processing. However, there is no reason that ways can not be found around this barrier. For example:

- If a signed waiver of the right is not sufficient in the state, then perhaps it can be notarized;
- If a notarized waiver is not sufficient, then the formally opposing party could be the one to file the action -- with formalization of assent at the courthouse, or;
- Both parties could come to the courthouse on the day the case is begun and affirmatively indicate their assent;

¹³⁰ Such an administrative procedure might need far greater protections in terms of full investigation than is typically the case in administrative procedures as now envisioned. For example it would not be appropriate to defer completely in the adoption process to the conclusions of far-from-disinterested adoption agencies.

¹³¹ Publication requirements, for example, made much more sense when everyone read the paper. Now they are largely useless, except as a revenue source for newspapers.

- More ambitiously, there could be a system in which a wide variety of government offices – including local police and post offices -- could be used for formal manifestation of assent to the waiver of the right to service;
- Moreover, emerging biometric identification technologies could be used to permanently record the fact of assent, even from a distance.¹³²

One Form, One Webpage, and One Day Resolution Should Be the Goal

So the ultimate idea is simple. In truly assented-to proceedings, the parties should be able to jointly submit one document, that document alone should contain all that is needed for the formal confirmation of the decision, and the entire proceeding should be concluded in one day – indeed instantaneously if possible.

Of course the submission and decision forms or screens should be as simple as possible, fully self explanatory, well laid out, making use of color and graphics, and designed to go logically from the beginning to the outcome. It would be a good exercise for any reform or redesign group to set out with this one day one form goal, and then identify any barriers, explicitly trying to design around each such barrier one by one.

Electronic or Mail Resolutions Should be Acceptable and Encouraged

Wherever possible the communications, filing, and decisions should be through a webpage and/or electronic mail, thereby speeding the process and minimizing the disruption to the parties.¹³³ The rapidly changing world of advanced biometrics should quickly make true electronic filing and confirmation of identify easy.¹³⁴

XVI. Mixed Cases – Self Help and Represented Together

Most judges seem to fear the mixed cases, those in which one side has a lawyer and the other does not, more than those in which there is no lawyer on either side. While there is no research on this matter,¹³⁵ there are several, not necessarily inconsistent, theories as to why judges feel this way.

¹³² For example, people could assent by telephone, with recording and stress analysis to make sure that there was no risk of force or lack of true assent.

¹³³ An example is the small claims filing e-filing system in place in Sacramento California. <http://www.apps-saccourt.com/scc>.

¹³⁴ For information on these new technologies, go to <http://coverage.cnet.com/Content/Gadgets/Techno/Biometrics/?st.cn.fd.gen.gp>

¹³⁵ There are statistics on the frequency of the underlying phenomenon, however, *Meeting the Challenge*, *supra*, note 2 at page 8.

First, the judges may actually be right. In other words, counsel may really try to take advantage of the un-represented by trying to exclude relevant evidence, by confusing them by needless, if technically appropriate objections, by insisting on hyper-technical foundations for evidence, and by making use of every superior knowledge of the process. If this is true, judges may feel both the most need to intervene in these cases and the most fear that there will be repercussions for the judge after such intervention.

Second, it may be that the real reason judges are upset with the mixed cases is that they are actually quite comfortable helping those who do not have a lawyer, but just do not like to get caught doing so, and are fearful that an attorney will complain about their lack of neutrality. Indeed it may be that they are therefore much less helpful to the un-represented when there is a lawyer there, and that they know they are doing less in the very cases when they need to be doing more.

Third, it may be that they are very uncertain about how to help those without lawyers, but feel that it does not really matter when there is no lawyer there at all. They take tight charge of the proceedings and getting to a result, and do not worry too much about the needs of the parties in getting their stories out.

However, whatever the feelings of the judge, the self-help court must develop clear techniques that make it possible for the litigant to get the help they need to present their case, without any threat to the actual or perceived neutrality of the judge. Some techniques are discussed below.

A Mixed Case Calendar May be Needed.

A mixed case calendar would bring all the mixed cases together. One of the greatest advantages of such a calendar is that all the parties would watch the other cases and see that the judge was trying to establish balance, rather than tilt toward the person without a lawyer. Counsel, in particular, would learn the “rules” of the self-help calendar, and temper their objections to the judge’s expectations. The parties with lawyers would learn that the judge was “helping” all those without counsel, and not perceive the action as tilt. The parties without lawyers would learn that there would be limits on the help that would be given.

There Would be Advantages to a Special “Mixed Case” Pretrial Conference to Explain the Process

This mixed case calendar could have a special pretrial conference in which the parties and counsel would have the rules of the mixed calendar explained. Such rules might include:

- Objections to foundation of evidence will result in the offer of continuance;
- Cross-examination by counsel must be accompanied by explanation of purpose, and;
- Objections must be explained more fully;

The judge, in conducting the conference could require additional warning from the represented party as to likely objections, and emphasize the need for additional explanation from both parties of the planned evidence. The judge could make a specific self-help referral if needed. It might be that pretrial conferences that could be handled by a magistrate in no-counsel cases would require the judge in one-counsel cases.

Separate the Provision of Help in Preparing and Presenting Evidence from the Need for Absolute Neutrality in the Adjudication Process

More generally, in one counsel cases it will be even more important to separate the helping function from the adjudicatory function. This can be done by a more detailed discussion of the planned evidence on both sides by court staff, by additional counseling, or by referral.

Such separation could even be achieved during the trial. A judge could choose to conduct the trial as follows. She or he could first explain that during the evidentiary phase, there will be generous help for both sides in telling the story. Then the judge could indeed provide that help to both sides (although that help would be less necessary for the party with counsel), and only then begin a more formal step by step adjudicatory phase (as described above) relying on the previously admitted evidence.

Making Sure that People are Not Excluded/Intimidated from Participation

Finally, whatever else happens, the judge has an affirmative obligation to protect the self-help litigant from abuse of any kind from counsel. The fulfilling of this obligation may well require far greater constraints on counsel that would be required in a case in which both parties have counsel, and no judge should ever feel inhibited about exercising that responsibility.

Part Five: Building a Broad Self-Help Court Team

A self-help friendly court will need a different kind of staff, working together in a different way. It will need to function as a team, taking collective responsibility, regardless of formal role, for the openness of the court to those without lawyers. Most importantly, in order to empower litigants, the court will need first of all to focus on ways to empower the entire team to be creative and effective in this collective responsibility. A first step is recognizing that working with self-help litigants is neither boring, nor repetitive; approached with a sense of possibility it is both exciting, and empowering, and critically important.

XVII. Selection and Training of Those Who Manage the Case Process

Managing the Case Process In a Self Help Court Requires a Different Kind of Clerk/Caseflow Manager

With technology and electronic filing about to redefine fundamentally the role of court clerks, it will be necessary for any court to reevaluate the needs and requirements of that role. Clerks will need to become less and less paper filers, and more and more manager of information flow.

However, given the case load and case flow management needs of the self-help court, the responsible staff will have to have a different set of skills from those in a traditional court. They will have to:

- Deal flexibly with the information needs of the people who file and respond to cases;
- Establish and manage systems that give people the information they need to pursue their cases;
- Deal intelligently with the constant minor crises of self-help case handling and management;
- Work appropriately with court staff and community groups who are now meant to help and advocate for litigating clients, and;
- Assist the judge in managing the courtroom itself in accordance with the values of access.

While it is true that the restructuring described above will take some of the strain off the clerks position, nonetheless, the actual client-oriented tasks that clerks will still be required to perform will take a different set of skills. The selection process will have to be designed to reflect these different needs.

They Will Need the Qualification of Interpersonal Skills

In a self-help court, interpersonal skills become much more important. The clerks/case managers will have to know how to talk to people who are in crisis and are overwhelmed by fear and tension. They will need to know how to do so consistently with the needs of balance and neutrality, and yet be truly helpful. They will no longer be able to hide behind the excuse that they can not practice law, but rather will have to find the appropriate role that is both helpful and neutral. While achieving these goals is partly a matter of having clearly articulated and well developed rules,¹³⁶ it is ultimately a matter of human skills, being able to find the way to understand the needs of the litigant, and provide that help within those formally agreed parameters.¹³⁷

They Will Need a Higher Level of Legal Skills

While the full parameters of the legal skills needed by clerks/case handlers will depend on the overall self-help staff configuration, it seems a safe generalization that clerks will need greater legal skills. The processes of self-help courts are likely to be more flexible, and more frequently in flux. Those who manage the processes and apply the self-help friendly rules will have to understand the subtlety in those rules in ways that make it easier for them to be flexible when appropriate.

To the extent that other self-help resources in the court are more limited, and to the extent that the decision has been made to integrate the filing and self-help processes,¹³⁸ those who manage the filing process will need to be self-help counselors too, and as such will need wider legal knowledge of both process and substance.¹³⁹ To the extent that self-help courts have more general jurisdiction than the current small claims or housing courts, the case management staff will also need sufficient legal knowledge to manage the broader range of legal issues raised.

They Will Need Advanced Collaborative Skills

The clerk/case manager will be part of a team in a self-help court. She or he will be deeply involved both day-to-day in case handling and, longer term, in system redesign with the other members of the team – judge, self-help staff, enforcement staff, system

¹³⁶ Greacen *supra*, note 19 at page 15.

¹³⁷ Even the currently agreed definitions of what clerks can do, Greacen *supra*, note 19 at page 13-15, provide a lot of leeway. A clerk without human skills will not know how to use that leeway and will leave the litigant feeling ignored. Conversely, the clerk who wants desperately to help, and does not have the human skills to provide that help within the permitted context, will not be long in the position.

¹³⁸ See above at page 24, for the advantages of minimizing the number of steps in the process.

¹³⁹ In California, the self-help staff have law degrees, California Family Law Facilitators Act §10002. As such they have become much more assertive in the provision of practical advice, and appear to have a much greater impact on the proceedings.

designers, technology innovators – and must know how to work effectively with people with different perspectives and skills.

In particular, clerks in the self-help court will usually have a less exclusive relationship with the judge than in the traditional court structure, and they will have to build credibility and legitimacy on foundations that go beyond that now less exclusive relationship. They will need a confidence in what they bring to the process, understanding of the needs and legalities of the filing and information flow process, and how to relate it to varied situations.

They Will Need a Sufficient Level of Technology and System Confidence to Collaborate in System Design

Clerks/case managers will be key players in the ongoing process of system redesign. They will need to have the ability to think generally, to apply lessons from the problems that crop up, and work together with the other players to craft substantial modifications in the case and information flow. Since many of these changes will involve ever more sophisticated use of technology, they will need the confidence to engage this technology not just as users, but as designers and conceptualizes.

We Need A Newly Defined and Higher Status Role

In sum, the clerk/case manager in the self-help court will be much more than the traditional clerk. As such he or she should be more highly educated, better supported and more integrated into the professional team. In addition, there should be better promotional opportunities, and appropriate compensation.

XVIII. Judges: Selection, Training, Materials

A self-help judge has far grater responsibility than a “traditional” judge. A judge who has the benefit of counsel in the courtroom must merely manage the procedure of the case, and make fair and unbiased factual and legal determinations. A judge who has no attorneys in the courtroom has the additional responsibility of making factual and legal determinations without the benefit of the assistance of counsel in telling those stories as comprehensively and effectively as possible. In order for the judge to do this job right, she or he has both to make sure that each side’s story – factual and legal – is out, and also make factual and legal sense of those stories without the assistance of counsel. Moreover, all these additional responsibilities must be fulfilled without in any way violating either the obligation of impartiality, or that of the appearance of impartiality.

Moreover, even though these tasks should be made somewhat simpler by innovations such as those suggested in this paper, the judge’s role is made more difficult

by the need to assist in the implementation of such innovations. In short, such a judge needs substantial additional skills, some of which are discussed below.¹⁴⁰

Legal Knowledge is More Important in a Self-Help Judge

Classically, when a judge does not know the law, or what to do, he or she gives both counsel an opportunity to give their adversarial view. It is generally quite easy for the judge to separate the wheat from the chaff. Often, moreover, counsel's failure to make a point, or objection, means that the right of appeal is lost.

The self-help judge, on the other hand, can realistically expect no help on the law from the litigants. On the contrary, any confusion, hesitation, or uncertainty on the law from the judge is likely at best to lead to additional confusion in the courtroom and at worst to a lack of confidence in the outcome on the part of the parties.¹⁴¹

Therefore, it matters much more that a self help judge is knowledgeable about the law, able to research and to come to quick judgments about the law, and confident about that ability. This has important implications for selection, training, and for promotion and remuneration.

On-the-Spot Analytic Ability is More Important in a Self-Help Judge

Similarly, the ability to come to quick analytic decisions about both fact and law is much more important in a self help judge than in a judge who can expect the collaboration of counsel in setting the pace of the hearing or trial, and in managing the parties.¹⁴²

The Ability to Issue Quick, Clear, Immediate Decisions is Important in a Self Help Judge

The ability to issue quick and to point decisions that are comprehensible to the parties is much more important in a self-help judge. In the self help case there are no counsel to explain the decision. Clarity helps produce finality and legitimacy.

¹⁴⁰ Nor can it be forgotten that judges do need time (and resources) to perform this more demanding and complex role both in and outside of the courtroom. Part of the innovation process is analyzing how much judicial time this more sensitive system of case handling will actually require, and taking the steps to make sure that it is provided.

¹⁴¹ In theory a self-help judge can take all the evidence, and wait to resolve the law until there has been time for research. This, however, makes it harder for the judge to explain to the parties what is going on as it happens.

¹⁴² Trials shown on television tend to emphasize the extent to which counsel try to seize control of the courtroom from the judge. That happens rarely in the low-hype world of most of the legal system.

Interpersonal Skills and the Ability to Show Sympathy Are More Important in a Self-Help Judge

The emotional dynamics in the courtroom without the lawyer are different. The client feels much more on their own, much more at the mercy of the court, and much more dependant on the decency and fairness of the judge. In short, even more than when there is a lawyer, the legitimacy of the outcome depends on the way the judge projects the process to the participants.¹⁴³

Moreover, litigants without lawyers simply have no one to talk to to understand what is going on. There is no one to explain away the harshness or lack of consideration of the judge.

If judges want their decisions and their courts to be legitimate, they therefore have to take responsibility themselves for the emotional impact of their conduct, the way they conduct their courtrooms, and even the decisions they render.

Some of the ways that effective judges are reported to display this emotional connection to the parties are as follows:

- Remarks that show an appreciation of how emotionally hard such conflicts are for the parties and a commitment to make it as easy as possible;
- Personalization of the judge by telling something about oneself, including name and something about self;
- Attempts to explain as much as possible before, as, and after it happens;
- Insisting on respect for all parties in the courtroom, and;
- Always allowing people to finish their statements, and explaining any limitation in fair, comprehensible and specific terms, not in generalities¹⁴⁴

Consideration Should be Given to Using Specialists in the Substantive Area of Law Rather than Generalists

Given the importance of specialist legal knowledge in self-help courts, thought should be given to recruiting substantive specialists rather than generalists.

¹⁴³ Recent polling research underlines the importance of this trust. *National Conference on Public Trust and Confidence in the Justice System: National Action Plan 7-9* (National Center for State Courts, 1999)

¹⁴⁴ Thus, for example, to state that something is “not relevant” is not enough. There is need for an explanation of why a particular piece of evidence is not legally relevant in the circumstances.

Alternatively, Self-help Judges Should be Assigned to Hearing the Same Type of Cases for Substantial Periods of Time

Even if generalists are selected as judges, consideration should be given to having them hear the same kind of self-help cases for substantial periods of time. During this time expertise can be built up, and relationships with the court team can solidify.

Self-Help Judges Need More Intense Training, Especially in the Issues Relating to the Management of Self-Help Litigants

For all these reasons, self-help judges need more intense training in substantive law, in evidence and procedure, and in the special procedural, emotional and ethical issues associated with the judging of self help cases.

Such training should include extensive role playing and sensitizing to the needs and experiences of self-help litigants, as well as the more traditional training components.

In addition to strengthening the state-based judicial training institutes, we need the creation of a national self-help judicial training environment in which judges can be trained in the management of the self-help courtroom. Such training programs should use videos, simulations, exercises, as well as more traditional methods. Such a national institute would speed interstate sharing of ideas and experiences.¹⁴⁵

Moreover, special training materials should be developed for use by judges on a state and local level.

Judges Should Have the Skill to Participate in the Self Help Planning and Implementation Team

Self help court judges should be selected in part on their ability to manage the planning and implementation process, and specifically on their ability to do so in a collaborative way. Given the myriad interests and institutional role definitions at work, a self help judicial leader needs to be sophisticated in his or her ability to bring people together around the common vision of the self help court. This ability depends on concrete skills such as:

- The ability to articulate a clear vision;
- The ability to see the needs of each group in the collaboration, and how to meet those needs without threatening others;
- Capacity to move step by step, keeping the vision in mind;

¹⁴⁵ The current lack of judicial writing on the subject is little short of astonishing. Compare, generally, *Meeting the Challenge*, *supra*, note 2, at pages 52-53, summarizing the ambiguity of judicial attitudes.

- Setting and marking of milestones of achievement that are experienced collectively, and;
- Willingness to obtain feedback and evaluation information and to act on that information.

Decision Templates for Judges Would Help in Both Training and Courtroom Processes

A significant collaborative opportunity, as well as an important training tool, exists in the process for creating the kind of judicial decision and court process templates described above.¹⁴⁶ These templates provide an opportunity for the different court team players to come to agreement about the processes of the court. They are themselves an important product for the managing of the court day to day. Finally, they provide an important tool for the judge to help himself or herself to do the job.

XIX. Litigant Help Staff

As experiments in self-help courts and self-help assistance programs proliferate, we will slowly create a new kind of court staff role, with its own skills, its own ethics and ethics rules, its own promotional and evaluation systems, and its own relationship to the other members of the courthouse team. As yet we can only begin to generalize based on little experience.

Self Help Staff Should be Broadly Trained in a Complex Role

For all the reasons discussed in the sections above on clerks and judges, self help staff will need to be knowledgeable in the law, good at team work and innovation, and have sophisticated human skills. Perhaps most important, however, they will need the ability to manage complex and as yet somewhat undefined roles, in which they are helpful to litigants, but are yet able to put lines around that help. They will have to feel personally comfortable with such line drawing, but not at the price of developing an emotional distance from the needs of self help litigants.

While training for self help staff will depend on the actual tasks ultimately assigned within each court, focus will need to be on the right balance of human and legal skills. Such training will need to be very “hands-on” using role playing, video, and simulations.

While there are probably many models in the private sector’s training of customer relations staff,¹⁴⁷ the essence of such training will be somewhat different, since it will be in giving the staff the skills to help court users find within themselves their own strength

¹⁴⁶ See above at page 49.

¹⁴⁷ Airlines, for example, provide extensive training to their flight staff on how to manage angry and unhappy passengers.

to present and handle their own cases. In a sense, therefore, the more appropriate model will be teacher and counselor training. A sample training program for self help staff might include discussion of:

- Institutional Role of Self Help Staff and Their Relationship to Other Players in the Team;
- Court Processes and Procedures;
- Substantive Law;
- Alternate Dispute Programs Available;
- Understanding the Needs of Litigants;
- Counseling and Assistance Skills;
- Ethics and Obligations of Self Help Staff, and;
- Innovation Role of Self-Help Staff.

One of the most fascinating aspects of self-help programs is the extent to which the staff of many programs seem to have become informal ombudsmen. The self-help staff have perhaps the best information in the courthouse about what is going wrong. Because the self-help staff are in a new and as yet somewhat undefined program, the rest of the system does not have a clear view of limitations upon their role. It is therefore possible for the self-help staff to engage judges and clerks, both drawing attention to problems and offering solutions. Efforts should be made to maintain this role, even after the self help support role becomes more institutionalized.

Court Assistance Volunteers and Participants in Attorney-of-the-Day Programs Will Need Appropriate Training and Support.

Court volunteer programs and attorneys of the day will also need appropriate training programs. For volunteers, again depending on the role that they will play, the training may need to be quite extensive, focused similarly to those designed for the self-help staff. For attorneys-of-the-day, the training will more have to focus on the difference between that somewhat limited role and the broader role that they may more usually play.¹⁴⁸

¹⁴⁸ Some attorneys-of-the-day will do little legal work, or at least little litigation work, in their “day jobs.” The program will need to screen for such attorneys and provide additional substantive and procedural training.

Ethics and Conflict Rules

The ethical rules that will govern those engaged in self-help support are in rapid change and self-help programs must both work within these changes, and work to shape them appropriately.

Four main trends are discernible. The first is the clarification of the rules under which those associated with a court must operate. The second trend concerns changes in the rules under which attorneys may give partial representation. The third concerns changes in the limits upon practice by non-attorneys, and the fourth concerns judicial ethics and the limitations on assistance to self-help imposed by neutrality requirements.

In summary, with respect to staff of self help programs, it is slowly becoming clear that non-attorney staff can provide far more information than normally realized, so long as that information can be characterized as other than legal advice.¹⁴⁹ It is similarly becoming clear that attorney self-help staff can provide an even greater range of assistance, provided that the recipients realize that they have no attorney-client relationship or confidential relationship with the provider of the advice.¹⁵⁰

Similarly, it is becoming clear that attorneys are free, consistent with their ethical obligations, to provide legal advice and assistance, divided up and structured in a wide variety of ways, provided that that division is with the informed consent of the client, and provided that that division is reasonable, that is to say that it does not cause harm to the client.¹⁵¹

A similar, but slower process is proceeding with respect to limitations on non-attorney practice. This process is leading to an increasing understanding that current limitations are both damaging and unrealistic. The practical trend is simply to fail to enforce limitations on the unauthorized practice of law. The legal trend is to move toward at least openness towards paralegal licensure, and toward an increase in the kinds of work that fall outside the legal monopoly.¹⁵²

Finally, there is a slowly increasing, but as yet almost undocumented, appreciation that the limitations on judicial assistance to self-help litigants have perhaps less force in providing the help that is actually needed. This appreciation depends on an increasing focus on the help that is needed, on a realization that little of that help needs to

¹⁴⁹ Greacen, *supra*, note 19 at page 15.

¹⁵⁰ The California Statute is quoted above at note 65.

¹⁵¹ These views are reflected in the Ethics 2000 proposals. Ethics 2000 Commission, Proposed Rule 1.2 (Scope of Representation and Allocation of Authority Between Lawyer and Client [clarifying that lawyer and client may agree to limitation on “scope” of representation if “the limitation is reasonable under the circumstances” and if there is “informed consent”]);

¹⁵² E.g. *Perkins v. CTX Mortgage Company*, ___ Wash. ___, ___ (1999) discussed at note 22, *supra*.

be provided by judges, but can be provided by other institutions, and by learning how to provide the help that does need to be provided in the courtroom as neutrally as possible.

Litigant supporting staff obviously need to be fully aware of these emerging rules. They need to understand their logic as well as their formality. Above all, they need to understand that the rules are now changing so that far from acting as an inhibition on assistance to the self help population, they are now making that assistance possible.

The creation of self-help courts is likely to place even greater strain on the traditional categories governing ethics and practice. Self-help courts will be at the forefront of changes as they emerge.

XX. Conciliators, Probation Officers, Interpreters and Other Support Personnel

The self help court will include not just the usual but an expanded team of other personnel, conciliators and probation officers, office staff and receptionists, judicial assistants and security personnel. All will have their jobs and roles subject to redefinition in an organization that is explicit about its goal of providing an environment that works for people without lawyers. While the skills and abilities they will need will continue in large part to be defined by their specific roles, their participation in a self help court will require special abilities to understand and meet the needs of self-help litigants and to work with a team to do so. All that is written above applies both directly and by analogy to these associated agencies.

Such Staff will Need the Capacity to Deal with the Self-Represented

Staff of these ancillary functions will have to be able to deal directly with litigants, without the mediating assistance of counsel. Therefore, as much as the staff of the court in chief, staff of associated agencies will need skills of clarity, immediacy, sympathy and understanding.

At the same time, they will need the ability to translate the agenda of their agency to those without lawyers. Their clients, moreover, are likely both to be less angry and hostile to the institution as a whole, than those who deal with traditional courts, but also to have higher expectations than litigants in traditional environments.

Such Staff Will Need the Skills to Team with Self-Help Counselors

In particular, such staff will have to see themselves as part of a self-help team, partnering with the self-help staff, clerks, and judges to create an overall environment. They will have to be open to analyzing the barriers in their own office, as well as redesigning their own processes so that it meshes with the reformed court processes. Examples of this meshing might include:

- The creation of templates for the process of the office;

- Integration of these templates with those of the court as a whole;
- Integration of the computer and help systems of the office with those of the court;
- Establishment of joint help, advice, and information programs;
- Establishment of joint ombudsperson programs;
- Joint relationships with community organizations;
- Joint training on self-help skills, and;
- Joint and mutual evaluation of the programs from a self-help point of view.

The Interpreters are Not an Ancillary Agency, But Central to the Self Help Court

Those who face language barriers and who have no lawyer face a double barrier to access, while those who face a language barrier but do have lawyers have an ally in overcoming any language barrier. Therefore, a court that is designed to be open to those without lawyers, must be planned from day one to be particularly effective in overcoming language barriers. Some of the necessary techniques are:

- Translations of notices and pleadings (with court staff available to translate outgoing pleadings when necessary);
- Availability of telephone interpretation whenever needed for any stage of the process;
- Self-help staff with multi-lingual ability;
- All materials available in many languages;
- Computer programs available in many languages;
- Judges alert to multi-language and multi-cultural issues, and;
- Training for staff in multi-lingual and multi-cultural issues.

Perhaps more importantly, the court should have a multi-lingual issues ombudsperson, with access clearly publicized (in many languages).

The Court's Response to Physical Barriers to Access is Similarly Central

The same is, of course, true for those who physical barriers such those who must rely on a wheelchair, or have problems with sight or hearing.

A self-help court will need to use every possible assistive technology. Its staff should also include an ombudsperson for the physically challenged. Both ombudsmen

should have easy access to the chief judge of the court, in order to cut through bureaucratic barriers.

XXI. Relationship to Community and Advocacy Organizations

A core capacity of the self-help court will be its collaboration with community and advocacy organizations.¹⁵³ These organizations will be able to do things that the court itself can not do for fear of violating or appearing to violate neutrality norms. Some of the many possibilities are discussed below.

Courts Will be Able to Enter Into Contractual Relationships for the Provision of Advocacy Self Help Advice

While it is now agreed that courts can operate self-help centers, and can indeed spread a helping ethos throughout the courthouse, there are limits to the extent of the advocacy help that can be provided.¹⁵⁴ However, there is nothing to stop a self-help court from contracting with one or more legal services groups for provision of more comprehensive and “lawyer-like” advice to those without lawyers.

Such programs could enter into confidential relationships with clients, could give help that was clearly “legal advice,” and could be zealous as traditionally defined by the profession. Although ultimately funded by the court, they would not be bound by the court’s neutrality obligations.

Notwithstanding the legal distancing, such programs could work very closely with self-help courts. They could operate in the building, and even the courtroom. They could screen cases for the court, and they could perform intake for traditional full representation for those cases that met income guidelines and case criteria.¹⁵⁵

Courts will be Able to Sub-Contract out Materials Development and Other Tasks.

Similarly, courts can contract out the development of materials and templates. Such materials could include booklets, posters, computer programs, videos, and training materials of all forms. Such materials can then have a stronger advocacy tilt, since not carrying the formal imprimatur of the court. But the court can assist in funding and

¹⁵³ One of the most innovative of these is the Ventura (California) Mobile Self-Help Center. The Center, a converted camper, travels throughout the county to a wide variety of community locations. Its staff offer information and a wide selection of self-help publications.

¹⁵⁴ For example, while an analysis helper working for the court (see above at p. 27) may well be able to help a litigant analyze the options facing that litigant, in the end the helper will not be able to tell the person how to choose. Perhaps more importantly, that conversation may well not be confidential.

¹⁵⁵ Such programs are functioning in Nevada and Fairfax Virginia.

distribution, particularly if the materials carry an appropriate disclaimer.¹⁵⁶ The courthouse itself is, of course, the most important location for such materials.

Courts Will be Able to Create Outreach Centers in Community Organizations

Such collaborations lead logically also to the creation of outreach centers associated with community organizations. Such outreach centers could provide a variety – indeed almost all – of the services that are provided in the court. They could include self-help advice, materials, use of templates, computer programs, hearing preparation, pre-trial conferences, and enforcement support. They might even be used to provide video conference hearings.

Building such outreach centers into the fabric of the court would not only provide for access, it would also sensitize the court and its staff to the realities of life in the community. Such sensitization could only enhance both the courts commitment to access and the overall quality of justice.¹⁵⁷

¹⁵⁶ An issue can emerge if such relationships result in the court being perceived as tilting towards a politically sensitive group, such as tenants. However courts can balance this either by making equal investments on all sides, or by assessing the need for self representation help and focusing on those groups in need of help. There is nothing imbalanced in such an approach.

¹⁵⁷ All too often fact finders and decision makers remain insensitive to the texture and context of community life, and their decisions reflect a lack of understanding of reality.

Part VI: Perspectives for the Long View

XXII. The Relationship Between Substantive Law and Self Help

There is a significant relationship between underlying substantive law, and the complexities of any system that adjudicates rights defined by that substantive law. The more complicated, or counter-intuitive the law, the more difficult it is to build institutions that do not require lawyers to resolve conflicts under that law. Moreover, highly technical substantive and procedural requirements provide greater advantages to those with lawyers over those who do not have lawyers. It might well be, therefore, that complex and technical laws, written to aid the weak and defenseless may well end up doing the opposite.

Self-help courts should therefore be alert first to the impact of such complexity on their operations, and then be open to advocating for simplification in the interest of increasing fairness and access. While generalizations about some complexity are hard, here are some initial points worthy of consideration.

Simple is Better - Examples Help.

Statutes that are guided by simple principles are easier for lay people to understand. Statutes that include examples, but without limitation upon those general principles, are easier to apply, since if well written, they will apply to the majority of situations, and are more resistant to being overwhelmed by defensive technicalities.

Procedural Complexity is Particularly Dangerous, Particularly When it is Designed to Make Life Easier for the Court.

Changes in procedure are particularly prone to impose additional burdens on self-help litigants. When such changes are designed to move work from the court to the litigant (a frequent theme in court rules), they increase barriers to the self-represented.

Discovery and disclosure requirements, pre-trial documentation, and similar innovations must be scrutinized carefully, and the help they give litigants balanced against the additional burdens they impose.

Mixing Procedure with Substance Tends to Produce the Most Complex Situation

Legal innovation frequently occurs by mixing procedure with substance. Those seeking to change a legal result will change the burden of proof, or create a presumption, or make a change in the quantum of evidence required to produce a prima facie case.

Such legalities are particularly hard for the self-help litigant to understand, and for the court staff or judge to explain or apply. Such techniques should be avoided, with the statute making a change in law directly and explicitly whenever politically possible.

All Substantive and Procedural Legislation and Rule Changes Should be Required to Include an Analysis of the Impact on Self Help Litigants.

States should adopt a legislative policy of requiring an impact analysis of new legislation and court rules. This analysis would require a clear statement of the additional burdens imposed by any changes on self-help litigants – regardless of whether intended and regardless of whether directly stated -- and the likely effect of these requirements. For example, any additional data gathering requirements would impose burdens on the self-help litigants who have to gather and provide that information about themselves, and perhaps even about their opponents.

Such an impact analysis requirement would act as a disincentive to needless additional burdens, and would make it more likely that self-help litigants would be exempted from many new requirements. Such a requirement would also help focus legislatures upon the burdens that already fall on those without lawyers.

XXIII. An Integrated View of Self-Help Court Management

The suggestions and proposals in this paper, taken in their entirety, would produce a radically different kind of court. More important, however, than any one innovation is the idea that the court should think of its goals and purpose in a very different light. As with all innovation, the hardest task of all is maintaining an ongoing focus on that set of goals after the first innovations have been put in place and institutionalized. Key is a management structure that keeps continual focus on that goal, and on the ongoing changes that are needed to keep moving toward that goal.

All the Staff and the Organizations that Work with the Court Together Must View Themselves as a Court Team

The varied self-help court staff need to think of themselves as a team for which any failure of access is a failure for the whole team. That team must find the ways of having the information and tools to make continual changes in their environment.

The Team Must Create a Self-Learning Environment that Makes Use of a Wide Range of Data to Implement its Vision

The team can do this by building a data and information system that tracks the way people use the court, and the outcomes, with a view to constantly analyzing underlying dynamics. Such a system can constantly track who the users are, what information they obtain from the systems, how they present evidence, how that evidence relates to their cases and outcomes, as well as changes in patterns of all these.

The systems should display visually, should be accessible to a broad range of the team, should be visible to them, and should include tools that notify users by e-mail of key events or even key changes in patterns.

Analysis of this data should not be a specialized function. Rather it should be built into the work of each team member, with each team member looking for things

going wrong, and for ways to collaborate with other team members to overcome the problem.

The Court Must Include Broad Systems of Feedback, Comment and Review

Even more important that internally generated data is the building in of systems for feedback and comment. Court users should be constantly monitored and given the opportunity to highlight problems. This should not be a separate function, but rather part of routine case handling. At the end of each case, judges should ask the parties if they have had any particular difficulties dealing with the court. Similarly, enforcement assistance staff should routinely ask users if problems in their enforcement efforts may be the result of uncertainty earlier in the case.

This feedback should be continually and widely shared both electronically and personally, with a high value placed on attempts to find solutions that go beyond one particular staff role.¹⁵⁸

Everything that Goes Wrong Should Be Viewed as an Opportunity to Improve Systems, and No Error Should Be Blamed on the Litigant

Anything that goes wrong should be viewed by the court team as an opportunity to design a change in practice to prevent the error from occurring again. Blaming an outsider to the system, or even part of the court team, only gets in the way of figuring out what change or innovation could prevent the outcome from recurring. It may well be that the best way of avoiding the bad outcome is a change in a part of the system apparently far from the bad outcome.

The Court Should Include a Powerful Ombudsperson Program

If the court is to be truly open, it must build a mechanism for the safe making of complaints about the functioning of the court. A well structured ombudsperson program gives court users the opportunity to complain to a person able to do something about the problem, as well as to make recommendations to the team about the need for changes highlighted by the complaint.

For such an ombudsperson program to be successful, it must have access on a regular basis to those which power – in this case the chief judge and his or her administrator.

¹⁵⁸

A model worthy of explicit praise is the I-CAN project in Orange County, California, described above in note 50. The Orange County Legal Aid Society is implementing legal self-help kiosks in libraries and other public access locations. The project routinely e-mails the daily reports for users to a wide variety of project partners and stakeholders.

The Court Must Be Alert to its Impact on the System as a Whole

Finally, the court must be alert to its impact on the system as a whole. It must be transparent in its functioning and on the way it innovates. It must be aware that its success in spreading innovations will depend as much on how well it involves others in conceptualizing its changes as on the quality of its changes. It should consider state and national advisory board functions to obtain buy-in from groups that might otherwise be threatened, and must take care to communicate its actions and its successes. It must be particularly careful to work with the local and state bar to show that it presents no threat. On the contrary, by encouraging unbundled legal services, it provides a new source of revenue to attorneys.¹⁵⁹

XXIV. Learning from the Self-Help Centered Court

Implications for the System Overall – Is this Any Different?

The innovations and ideas in this paper are focused on a court in which the litigant without the lawyer is the norm. However each of the ideas should be seriously considered for all the system. Most of the ideas and innovations are about balance, visibility, comprehensibility, efficiency, and fairness. They might well work to improve court processes even when the parties have the benefit of counsel.¹⁶⁰

Moreover, the self-help centered court provides a valuable learning environment, in which the impact of such changes can be studied and recommendations for the system as a whole made.

Introducing the Self-Help Audit

In particular, the many innovations suggest the possibility of a self help audit of a court. This audit would look at all the operations of a court – any court – with the view of the litigant without the lawyer. The audit would look at each portion of operations and examine the concrete experience of such a typical litigant. Did they have help with the creation of the pleading? Did they get help with the analysis of relief needed, evidence, and the phases of the action? Did the judge explain what was going on in comprehensible steps? Was there a place to complain if their needs were not met?

Such a detailed audit, tracking the categories of this paper, would be a powerful tool for courts to open themselves up. It could be used on a repeat basis to assess improvements in self-help access.

¹⁵⁹ The politics of this process is beyond the scope of this paper. See, generally Mosten, *supra*, at 12

¹⁶⁰ Compare the specific suggestions in Goldschmidt and Pilchen, *above*, note 31.

The Importance of Collaborations With Parallel Efforts

Such audits, and indeed such efforts generally, will advance with much greater force when used as collaborative tools. A wide variety of other agencies and forces are moving in the same direction, from legal services programs working on access to justice and legal education, to community groups empowering their members, and from other government agencies opening up their processes to private sector players emphasizing the customer. All are potential allies.

XXV. Conclusion

This paper has attempted to create a new vision of the courthouse. It is, however, a vision grounded in a fundamentally shared goal, one built into our constitution, and one rarely challenged, that our society can only work when all its members have trust that an impartial institution stands ready to enforce fairness in transactions and interactions. Without that institution at the ready, people can not enter into relationships and transactions, but must rely on force and the fear of force to protect their interests.¹⁶¹

Without courts our society dies. Without courts that are practically and effectively accessible, our society still dies, but more slowly and less obviously. The shell remains, but the essence is gone.

The self-help court can help keep the vision alive and move it forward.

¹⁶¹ Compare, COSCA White Paper, *above*, note 3, at page 5 (“Not only do litigants have a constitutional right to represent themselves, but also the judicial system has the affirmative duty to ensure that all citizens have meaningful access to the courts. A court system that declines to respond to or makes access difficult for litigants without lawyers violates this duty and effectively renders the right to represent oneself meaningless, creating a two-tier system of justice. . . . Acknowledging the obligation and devising appropriate responses to the increasing number of self-represented litigants is critical to the public’s expectations of the judiciary as a meaningful third branch of government and to the efficient operations of the courts.”)